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C #

**ELEMENTS**

**OF THE**

**LAW OF BAILMENTS**

**AND CARRIERS**

**INCLUDING PLEDGE AND PAWN**  
**AND INNKEEPERS**

BY  
PHILIP T. <sup>✓</sup>VAN ZILE

**OF THE DETROIT BAR**  
**AUTHOR OF EQUITY PLEADING AND PRACTICE**

D

**SECOND EDITION**

**CHICAGO**  
**CALLAGHAN & COMPANY**  
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## PREFACE TO FIRST EDITION.

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In the publication of this work it is not expected that any new principle of the law of bailments and carriers will be promulgated, for we fully realize the truthfulness and wisdom of that which was said three thousand years ago, "the thing that hath been, it is that which shall be; and that which is done is that which shall be done; and there is no new thing under the sun."

For ten years the writer has been engaged as a lecturer upon these subjects in the Detroit College of Law, and the interest awakened while thus engaged suggested the writing of this book.

The principles governing the law here discussed are by no means new; they are as old as the civilization of the races; as the recognition of "law and order," and the property rights of men.

The needs of men and the advancement of business have at all times brought to the attention of courts and authors new developments and situations for the application of the settled principles of the law; and so the most that can be said is, that while the law upon these subjects has been and is a development, it is a development of the application of principles rather than a creation of new and unknown rules of law; and all that any writer can expect to accomplish is to note this development by way of the application of these known legal principles to the new and novel questions of fact that the great business world is constantly presenting for the consideration of the courts and the legal profession.

The development of the law of carriers has been largely the result of the demands of public policy. It was the demand of public policy that laid upon the common carrier the extraordinary liability; and it is public policy that, recognizing the advance of civilization and the lighting up of the dark spots of earth, will modify that harsh and extraordinary liability, or at least allow it to be done by contract based upon valuable con-

sideration. These questions are interesting to the student and the practitioner.

The carrier of passengers, his relation to the passenger, and his liability have undergone interesting developments by reason of the appearance and adoption of the many important improvements in the vehicles of the carrier and the motive power introduced during the last decade.

There are no subjects of the law that are more replete with progressive reasoning from established principles than the subjects we have here treated. But while the past has yielded to us the settlement of interesting questions in the application of the law of bailments and carriers, the future promises questions of full greater interest in every department of business to which these subjects relate. They are continually taking on new activities and developing new and important principles. From the messenger service to the management of the great trunk lines of railroads, all are teeming with the push and improvements of the age. Electricity promises new fields not yet explored, but soon to be met. Improved machinery and appliances, the great increase in the volume of business, give an added interest to the law of bailments and carriers; and one who writes today stands merely upon the threshold, and can but contemplate with amazement the ever onswEEPing business and industries of men that are constantly presenting to the lawyer and the court new and important questions. Our past and present have, indeed, been important, but the future must be more so.

Should this work be instrumental in aiding the student of the law in his researches, and merit the commendation of my brethren at the bar, the writer will feel repaid for his endeavor.

Detroit, Mich., January 1, 1902.

P. T. V.

## PREFACE TO SECOND EDITION.

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Since the first publication of this work very many important cases have been heard and decided in the courts, giving to the profession new and important views of the law relating thereto. Statutes that have added new features to the law of bailments and carriers have been enacted by both state and federal legislatures.

The last congress of the United States made some important changes in the interstate commerce law, and undertook to pass a law fixing the liability of the carrier in cases of injuries resulting from the negligence of fellow servants.

Because of these changes and the important questions decided by the numerous courts of the country, where both the common law rules discussed in this work, as well as the more recent statutory enactments have received attention, and for the sake of presenting several new sections that are deemed necessary, and redressing and in several instances rewriting some of the old sections, and in furtherance of an endeavor to generally improve the work, it has been thought best to present this second and revised edition. Should it be accorded the kindly reception of the first edition, and meet or partially meet the needs of the profession in the subjects presented the writer will be rewarded for the labor it has cost him.

Detroit, November, 1907.

P. T. V.



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# PART FIRST

## ORDINARY BAILMENTS

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### CHAPTER I

#### THE RELATION.

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| <p>§ 1. Origin and growth of the bailment relation.</p> <p>2. Interpretation of the English courts.</p> <p>3. Definitions and criticisms of definitions.</p> <p>4. Some very common examples of bailments.</p> <p>5. Purpose of the bailment may necessitate a change in condition.</p> <p>6. — A further exception as to redelivery.</p> <p>7. — Grain stored in elevators.</p> <p>8. — Flouring mills.</p> <p>9. The Roman <i>mutuum</i>.</p> <p>10. The parties to a bailment.</p> <p>11. Who may be a bailor or a bailee.</p> <p>12. Competency of parties.</p> <p>13. These disabilities a shield but not a sword.</p> | <p>§ 14. The theory of the disability of an infant bailee.</p> <p>15. An agent may create the relation.</p> <p>16. Corporations.</p> <p>17. The kind of property that may be the subject of bailment.</p> <p>18. Delivery and acceptance.</p> <p>19. A summary of some essentials.</p> <p>20. Title of the bailor.</p> <p>21. Bailor may sell or incumber property—Title of bailee.</p> <p>22. Bailor must exercise good faith—Must not expose bailee to danger.</p> <p>23. Bailment or sale.</p> <p>24. — Commingling of grain on storage.</p> <p>25. A bailment, a sale, or a gift—How determined.</p> |
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§ 1. Origin and growth of the bailment relation.—Bailments and the bailment relation have existed since rights and obligations pertaining to personal property have had recognition in the law. For a long period of time in its earlier development the law of bailments was little understood or written upon, nor did it appear in the decisions of the courts; and later when referred to was often erroneously classified; and so knowledge of its application was slow and its adoption by the courts deferred. The Romans knew of it and wrote about

it. Their knowledge of the subject is evidenced by their analysis which is recognized to this day and quite generally adopted. Sir William Jones in that very learned and masterful essay on the Law of Bailments given to the world in 1781, which was among the first well-formulated productions on the subject, discussed the law of the Romans and their writers to some extent, and logically elucidated the doctrines already announced by Coke, Bracton and Holt in the English courts.<sup>1</sup>

§ 2. Interpretation in the English courts.—Coke and Bracton and other earlier writers on the English law gave the subject more or less prominence; but in some of the early cases the English judges found great difficulty in applying the law, especially in cases of gratuitous bailments, because as

<sup>1</sup> Sir William Jones in his *Essays on Bailments* (pages 16 and 18), in giving a summary of the Roman law on the subject, says: "Two great sources whence all the decisions of the civilians on this subject must be derived are two laws of Ulpian, the first of which is taken from his work on *Sabinus* and the second from his tract on the *Edict*." At page 25 of his essay he further says: "Now in order to ascertain the degree of negligence for which a man who has in his possession the goods of another is made responsible by his contract either express or implied civilians established three principles which they deduced from the law of Ulpian on the *Edict*; . . . First, in contracts which are beneficial solely to the owner of the property holden by another; no more is demanded of the holder than good faith, and he is consequently responsible for nothing less than gross neglect. . . . Secondly, in contracts reciprocally beneficial to both parties as in those of sale, hiring, pledging, partnership and contract implied in joint property, such care is exacted as every pru-

dent man commonly takes of his own goods; and by consequence the vendor or hirer or taker in pledge or partner and the co-proprietor are answerable for ordinary neglect. Thirdly, in contracts from which a benefit accrues only to him who has the goods in his custody as in that of lending for use, an extraordinary degree of care is demanded; and the borrower is therefore responsible for slight negligence." At page 36 he further says: "This had been the leaning generally and almost unanimously received and thought by the doctors of Roman law; and it is very remarkable that even Antoine Favre or Faber who was famed for innovation and paradox, who published two ample volumes '*De Erroribus Interpretum*,' and whom Grafina justly classes the boldest of expositors and the keenest adversary of the practicers, discovered no error in the common interpretation of two celebrated laws which have so direct and so powerful an influence over social life and which he must have repeatedly considered.

they argued there was no consideration to support such a contract. In the case of *Riches v. Briggs*<sup>2</sup> the court arrived at the correct conclusion, holding that the delivery of the property was a sufficient consideration to support the action; but upon error this doctrine was reversed; afterwards however, in *Game v. Harvie*<sup>3</sup> the court was unanimous in holding that the reversal in *Riches v. Briggs* was wrong. And so the courts continually wavered and changed their opinions, and the law remained in a very unsettled state; nor was it well understood or applied until there came that exhaustive and excellent opinion of Lord Holt in 1710, the celebrated case of *Coggs v. Bernard*<sup>4</sup> where for all time the difficulties that had before then arisen, were settled and this case became not only a leading case upon the law of bailments, but substantially the foundation and conclusion upon which this relation was to be supported in its application. While the learned judge in this case followed in a general way the doctrine that had been announced by the Romans, he more fully elucidated the doctrine, met all the objections and criticisms that had impeded a clear understanding and adoption of it, and it may be said that in this opinion he announced the doctrine of the law of bailments for all time.<sup>5</sup>

<sup>2</sup> Yelverton, 4 S. C. Cro. Eds. 383.

<sup>3</sup> Yelverton, 50.

<sup>4</sup> 2 Lord Raym. 912.

<sup>5</sup> In this case Lord Holt gives that complete and valuable analysis which has been ever since adopted by both writers and judges. He said in part: "The case is shortly this: This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him, some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at *Guildhall*. There has been a motion in arrest of judgment, that

the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labor. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward. I have had a great consideration of this case and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds, upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And (b)

§ 3. *Definitions and criticisms of definitions.*—The word “bailment” is derived from the French word “*bailleur*,” to deliver. In its legal sense, however, it has a much broader meaning and as we shall see involves several important elements.

there are six sorts of bailments. The first sort of bailment is a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor and this I call a *depositum*, and it is that sort of bailment which is mentioned in *Southcote's Case*. The second sort is when goods or chattels that are useful are lent to a friend *gratis* to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. The third sort is when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, *vadum* and in English a *pawn* or a *pledge*. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is

upon persons in cases of trust. As to the (a) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But (b) my lord *Coke* has improved the case in his report of it, for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them

Generally it may be defined to be the delivery of the possession of a thing in trust for a particular object or purpose expressed or understood and upon a contract express or implied to conform to that object or purpose.

that advance this doctrine, to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them show that there never was any such resolution given before *Southcote's Case*." . . . As to the second sort of bailment, viz.: *commodatum* or lending *gratis*, the borrower is bound to the strictest care and diligence, to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable. . . . As to the third sort of bailments, *scilicet locatio* or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. . . . As to the fourth sort of bailment, viz.: *vadium* or a pawn, in this I shall consider two things, first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for (c) the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawner to pay him. But if the pawn be such as it will be the worse for using, the (a) pawnee cannot use it, as clothes, etc., but if it be such, as will be never the worse, as if jew-

els for the purpose were pawned to a lady, she (b) might use them. But then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, etc., then (c) the pawnee may use the horse in a reasonable manner, or milk the cow, etc., in recompense for the meat. As to the second point *Bracton* 99 B. gives you the answer. . . . In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt, but yet it is sufficient if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. . . . As to the fifth sort of bailment, viz.: a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is



Ordinarily it is understood that when the object or purpose of the bailment is accomplished the property bailed must be redelivered to the bailor. This is always required, except when to carry it out the object and intention of the parties would

the case of the common carrier, common hoyman, master of a ship. . . . The law charges this person thus entrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailees, factors and such like. And though a bailee is to have a reward for his management; yet he is only to do the best he can. And if he be robbed, etc., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, etc. And yet if he receives his master's money and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his mas-

ter's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it; because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In *Bracton Lib.* 3, 100, it is called *mandatum*. It is an obligation, which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in executing his commission behaves himself negligently, he is answerable. . . . But secondly it is objected, that there is no considera-

indicate a different undertaking. It was this that occasioned much discussion among the authors. Sir William Jones defined a bailment to be a delivery of goods on a contract expressed or implied that they shall be restored to the bailor according to his directions as soon as the purpose for which they were bailed shall be answered.<sup>6</sup> This definition and all others involving the element of redelivery in specie was criticised by Judge Story for the reason as he says "In a bailment for sale, as in the case of a consignment to a factor, no redelivery is contemplated between the parties. In some cases no use is contemplated by the bailee; in others it is of the essence of the contract; in some cases time is material to terminate the contract, in others time is necessary to give a new accessorial right." Chancellor Kent expressed a doubt whether a consignment of goods to a factor constitutes a bailment. He defines a bailment to be "a delivery of goods in trust upon a contract expressed or implied that the trust shall be duly executed and the goods restored by the bailee as soon as the purpose of the bailment shall be answered," and takes occasion to criticise Judge Story's definition and criticism, and contends that a factor is not a bailee, and that to apply the word "bailment" to cases in which no delivery or redelivery to the owner or his agent is contemplated, "is extending the definition of the term beyond the ordinary acceptance of it in the English law."

But it may be said after a half century or more of discussion

tion to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the (a) defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if

a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing."

<sup>6</sup> Jones, Essay on Bailments, 1. A delivery of personalty for some particular purpose under contract that after the purpose has been accomplished the property should be returned, construed a bailment. *Bates v. Bigby*, 123 Ga. 727, 51 S. E. 717; *Smelting Co. v. Schultz & Clary*, 67 Kan. 605, 73 Pac. 903.

<sup>7</sup> Story on Bailm., sec. 2 and note 2; Kent's Comm. 40, note 1; Story on Bailments, sec. 2.

by eminent jurists it is now the settled doctrine and by the great weight of authority that the contention of Judge Story was correct; that a factor is a bailee.\*

Judge Story, in defining a "bailment," says: "Without professing to enter into a minute criticism it may be said that a bailment is a delivery of a thing in trust for some special object or purpose and upon a contract expressed or implied to conform to the object or purpose of the trust."\*

§ 4. **Some very common examples of bailments.**—A. leaves his overcoat with you in your office while he goes out into the city to transact some business. A mere accommodation on your part. You are the bailee of A.'s overcoat, A. the bailor.

A., a guest at a hotel, leaves his overcoat with the clerk or porter, and receives a check for it, according to the usage of the hotel. A. is the bailor, and the proprietor of the hotel is the bailee.

A. leaves his overcoat with his tailor to be repaired. A. is the bailor, and the tailor is the bailee; or, A. leaves cloth with the tailor, from which the tailor is to make him a suit of clothes.

A. loans his overcoat, without any reward, to B., to be worn and used by B.

A. deposits money with his banker.

A. leaves a box of valuable papers in a safety-deposit company's vault, in charge of the company.

A. consigns goods to be carried and delivered by a common carrier, an express company or a railroad company; and so thousands of examples might be given.

§ 5. **Purpose of the bailment may necessitate a change in condition.**—It often happens that the very purpose of the bailment indicates that the property is to be changed and is not to be redelivered in its original condition; as, for example, where wheat is delivered to the miller to be manufactured into flour; or cloth is furnished to the tailor to be made into clothing; or material to the wagon-maker with which he is to con-

\* *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 254; *Mack v. Story*, 57 Conn. 407; *Walker v. Butterick*, 105 Mass. 238; *Weir Plough Co. v. Porter*, 82 Mo. 23; *Middleton v. Stone*, 111 Pa. 589; *Barnes, etc. Co. v. Block Bros.*, 38

W. Va. 158, 22 L. R. A. 850, 18 S. E. 482; *Furst Bros. v. Bank*, 117 Ga. 472, 43 S. E. 728; *Johnson v. Allen*, 70 Conn. 738, 744, 10 Atl. 1056; *Strum v. Boker*, 150 U. S. 312-326.

\* *Story on Bailments*, sec. 2.

struct a wagon; in such like cases it goes without saying that the manufactured article is to be delivered to the bailor rather than the specific property bailed.<sup>10</sup>

§ 6. — **A further exception as to redelivery.**—Another exception to the general rule that the subject of the bailment must be finally returned to the bailor is found in those cases where, from the very nature of the business and the usage of trade, it is understood that property of like specie and value may be returned when the object of the bailment has been accomplished; as, for example, where money is deposited in a bank, or is loaned to a borrower, it is not expected in such cases that the very same money—the specific bank notes—will be returned to the depositor or the loaner, but on the other hand it is expected that the money will be used and that other money of the same value and amount will be delivered to the depositor or the loaner in payment. Usage, custom and public policy often fix and determine the law in such cases.

§ 7. — **Grain stored in elevators.**—Another exception to the general rule requiring the subject of the bailment to be returned to the bailor when the object of the bailment is accomplished is where grain is stored in elevators. This business, which has grown to immense proportions in this country, has of necessity wrought an exception to the general rule. Thousands of bushels of grain are stored for safe-keeping for hundreds of different owners; it would be impossible, at least impracticable, to keep each depositor's grain separate from the others so as to return the identical deposit; and it is not expected; the only separation of the grain is by keeping the same kind and quality in bins by itself, so the owner may have returned to him grain of the same kind and quality as that he deposited.

§ 8. — **Flouring-mills.**—Another exception which is recognized is in the case of storing grain with the owner of flouring or grist-mills, where the grain is kept separate only by putting like kind and quality together, as in the case of the elevator; the understanding being that the owners shall not receive their identical grain from the mill proprietor, but grain of like qual-

<sup>10</sup> Where it appears by the contract that it is the intention of the parties that the title shall not pass, but that the receiver shall sell it for the person who delivered it to him, the transaction is a bailment. *Harris v. Coe*, 71 Conn. 157, 41 Atl. 552.

ity and quantity, or flour, or the mill product of such grain, as the owner may desire from time to time.

Some important questions have arisen in the courts as to the status of the parties in this kind of bailments. Are they bailments or sales? In case of loss who is the owner? who the loser?

§ 9. The Roman *mutuum*.—These exceptions to the general rule above noticed resemble to some extent the "Roman *mutuum*," which, at common law, was considered to be a sale of the property.

An exposition of this is given by Gaius as follows: "This," he says, "chiefly relates to things which are estimated by weight, number or measure, such as money, oil, wine, corn, bronze, silver and gold. We transfer our property in these on condition that the receiver shall transfer back to us at a future time not the same things but other things of the same nature. wherefore this contract is called *mutuum* because thereby *meum* becomes *tuum*. This transaction is more in the nature of a loan, where it is intended to part with the title to the thing loaned, than a bailment. As was said by Judge Story: "In a *mutuum* the property passes immediately from the mutuant, or lender, to the mutuary or borrower."<sup>11</sup> The parties are in the relation of lender and borrower, and the property of a nature that can be at once appropriated by the borrower; not the loaning of property, in the sense that the parties expect the identical thing will be returned, but rather the loaning of a thing that is to be paid for in money or in kind, and so in that respect is somewhat in the nature of a sale; as where a merchant borrows of his merchant neighbor certain goods to be sold in his store,

<sup>11</sup> Story on Bailments, sec. 47. Sir William Jones in his essay on Bailments, page 64, in defining a *mutum* and distinguishing it from the "third sort" of bailments, says: "I call it after the French lawyer '*loan for use*' to distinguish it from their loan for consumption or the *mutuum* of the Romans, by which is understood the lending of money, wine, corn and other things, that may be valued by number, weight or measure,

and are to be restored only in equal value or quantity; this latter contract which according to St. German is most properly called a loan, does not belong to the present subject; but it may be right to remark that the specific things are not to be returned; the absolute property of them is transferred to the borrower, who must bear the loss of them if they be destroyed by wreck, pillage, fire or other inevitable misfortune."

with the understanding that they are to be returned in kind or be paid for in money, the title of the goods passes to the borrower, and therefore is not a bailment.<sup>12</sup>

§ 10. *The parties to a bailment.*—The parties to a transaction called or defined to be a bailment are (a) the bailor, and (b) the bailee. (a) The bailor is the party or person who, having the property in his possession, “delivers it in trust for some special object or purpose, and upon a contract expressed or implied to conform to the object or purpose of the trust.” (b) The bailee is the party or person who accepts the property and the trust, and continues in the possession of the same until the objects or purposes of the trust are carried out, or the bailment is terminated.

§ 11. *Who may be bailor or bailee.*—One who is the owner of personal property and entitled to the possession of it, or one who has simply the possession of such property may become a bailor of it. He need not be the owner of the property nor need his possession be a lawful possession. This is a relation arising upon and involving the possession of personal property. One capable of entering into a contract is competent to become a bailee, but this is not a requisite in all cases, for the relation is created in some instances by delivery of the property to persons not competent to make a contract; as to an infant or a married woman. The inability of the bailee to make a contract only affects his liability in case of loss or injury to the subject of the bailment. A person may become bailee with-

<sup>12</sup> In *Caldwell v. Hall*, 60 Miss. 330, 45 Am. Rep. 410, in discussing this subject, the court say: “The irregular and anomalous character of bailments, well defined and recognized in the Roman continental law, is alluded to rather than distinctly announced by the common-law writers. In our system of jurisprudence it is treated as a sale rather than a bailment, and this seems to be its proper aspect, since its practical effect must always be to operate a transfer of title where chattels are deposited, and to create the relation of lender and borrower whose money is in-

involved. In the one case it is a sale, with the right in the purchaser to return the thing delivered or its equivalent in kind, though not in specie. On the other it is a deposit of money with the understanding that it is to be surrendered on demand, but with the right in the receiver to use and replace it for the desire. . . . It follows, therefore, that in the common law the idea of bailment in this class of cases is lost in that of a purchase, where the thing deposited is a chattel, and in that of debtor and creditor where it is money.”

out his voluntary act as where the possession of the property comes to him unsought or unconsented to, as for example, property coming to his possession or control by finding, by being left upon his premises, or received from one unlawfully depriving the owner of it.

It would be difficult to mention all who may assume this relation as parties. Innumerable examples might be given, for, as a general rule, whenever the personal property of one comes into the possession of another by reason of any right or privilege short of a gift or sale, actual or conditional, the relation of bailor and bailee is created. Factors, agents, commission merchants, trustees, warehousemen in the pursuit of their ordinary business, are all more or less subject to the law of bailments; nor is it confined to natural persons; corporations may become parties to a bailment either as bailor or bailee. The bailment relation is as wide as the pursuit of business and the parties to the relation as numerous as those who are engaged in it.

§ 12. **Competency of parties.**—As to the competency of parties to a bailment, it is a general rule that one who is competent to make a contract is competent to become a party to a bailment. Such a degree of competency, however, is not always required to create the bailment relation, for while that relation is a contract relation, there are cases where it will be held to exist between parties who are not competent to make a contract, as, for example, where the property of one comes into the possession of another by finding, the owner being an infant, a lunatic or one not legally competent to make a contract, the bailment relation would be held to exist and the possessor of the property would be held liable for the care and custody of it as a bailee and could not avoid his liability on the ground that the bailor was incompetent to enter into a contract in relation to such property. The relation would not be void but voidable. And so one incompetent to make a contract may become a bailee, and be liable as such.

§ 13. **These disabilities a shield but not a sword.**—While an infant or married woman at common law would be wholly incompetent to become a party to a contract, and would be able to avoid a contract of bailment if property should be bailed to, or received by them as bailee, nevertheless, if property comes into the possession of persons thus incapacitated, the law will require of them proper care to the extent, at least, that

they do not destroy, injure or misappropriate it. In case of misappropriation the law does not proceed upon the contract, but holds them liable as for a conversion of the property in an action of tort. And when an infant hires a horse and carriage to drive to a certain place, and without authority tortiously drives beyond that place, resulting in the death of the horse, he would be held to have converted the property.

§ 14. **The theory of the liability of an infant bailee.**—To hold an infant liable upon contract other than for necessities would be an innovation not to be thought of and generally the courts have limited the liability of infants for other than necessities to acts of trespass or acts that are purely tortious and not connected with contract.<sup>13</sup> But infants have been, and reasonably should be, held liable for fraud, deceit, falsehood and tortious acts while performing or acting under a contract, when they do not form a constituent part of the contract. If the damage complained of arises from breach of contract simply, even if there has been fraud or false representations as to the subject of it an action cannot be sustained upon the contract for a breach of it. Nor could an action purely upon a contract be changed to a tort, simply to deprive an infant of his plea of infancy. But where the wrong is more than the mere breach of the contract and is tortious in itself even though it be connected with a contract, the infant is liable in an action for the wrong and his infancy will be no defense.

This principle applied to bailments has often been invoked. The distinction observed by the courts in these cases is this: If the injury resulted at a time when the infant was acting within the terms of the contract, and was the result of his lack of skill or experience in carrying it out and not attributable to a wrongful intent, he would not be liable, for in such case the action would necessarily arise upon the breach of the contract.<sup>14</sup> But where there has been a distinct departure from the object of the bailment and the infant bailee has been guilty of a positive wrong amounting to a willful tort, he is liable and his infancy is no defense. As was said in *Towne v. Wiley*:<sup>15</sup>

<sup>13</sup> *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560; *Penrose v. Curran*, 3 Rawle (Pa.), 351.

<sup>14</sup> *Stack v. Cavanaugh*, 67 N. H.

149, 30 Atl. 350; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Young v. Mahling*, 63 N. Y. Supp. 181.

<sup>15</sup> 23 Vt. 355, 56 Am. Rep. 85.



"So long as the infant keeps within the terms of the bailment his infancy protects him, but when he departs from the object of the bailment it amounts to a conversion of the property and he is liable as much as if he had taken the property in the first instance without permission, and this the courts say is no hardship for the infant as well knows that he is perpetrating a positive and substantial wrong, when he hires the object of the bailment for one purpose and puts it to another, as he does when he takes another's property by way of trespass."<sup>16</sup>

§ 15. **An agent may create the relation.**—Acting within the scope of his authority, an agent may create the relation for his principal, and within the apparent scope of his authority can no doubt bind his principal as to third parties, even though he has no actual authority. It has been held, and is no doubt the law, that the agent may render himself liable if he knowingly exceeds his authority in this the same as he might in other matters. The doctrine of ratification of the agent's act applies in this as it does in other business transactions. Bailors and bailees may act and be bound by their agents, and the general doctrines applicable to the law of agency apply here as in other cases. Where the agent, however, acts tortiously and wholly beyond and without authority, he cannot bind his principal, but renders himself liable.<sup>17</sup>

§ 16. **Corporations.**—A corporation acting within its corporate authority may become either a bailor or a bailee. Corporations, from their very nature, necessarily must act through their agents or officers; but where the agents and officers act *ultra vires* they become personally liable, and do not bind the

<sup>16</sup> Freeman v. Rowland, 14 R. I. 39, 51 Am. Rep. 340. In Stack v. Cavanaugh, 67 N. H. 149, 30 Atl. 350, it was held that if the injury resulted from the want of skill or inexperience in driving, the bailor could not recover against the bailee. In Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189, the action was on the case for careless and immoderate driving the plea of infancy was sustained on the ground that defendant had not been guilty of a positive and willful tortious act which the court

held would render him liable for the damage, although it was a part of the contract that property should be safely returned. Green v. Sperry, 14 Vt. 390, 42 Am. Dec. 519; Churchill v. White, 58 Neb. 22, 78 N. W. 369. Contrary to this view and against the weight of authority are Schenk v. Strong, 4 N. J. L. 87; Penrose v. Curran, 3 Rawle (Pa.), 351, 24 Am. Dec. 356; Wilt v. Welsch, 6 Watts (Pa.) 9.

<sup>17</sup> Foster v. Essex Bank, 17 Mass. 479.

corporation. If, however, the property is received by the corporation by reason of the unauthorized acts of its agents or officers or by reason of acts *ultra vires*, it cannot retain the property, but is bound to redeliver it to the bailor.<sup>13</sup>

On the other hand, should the corporation, through its proper officers receive and continue in the possession of the property, it would be held to the duties and liabilities of bailee in the particular case.

§ 17. **The kind of property that may be the subject of a bailment.**—Personal property only can be the subject of a bailment; the property, however, may be incorporeal personalty, as stocks, bonds, and the like, as well as corporeal personalty, but real estate cannot be the subject of a bailment.

If A. rents a house, or a farm, or a storehouse of B., which is given into his possession under their contract or lease, the relation of landlord and tenant is created, not that of bailor and bailee. If, however, A. should take the household furniture of B. for storage, either for hire or without compensation, the relation of bailor and bailee would be created. The usual test is, the property must be personal property, and of such a nature that it can be delivered into the actual manual possession of the bailee by the bailor, and, after the object of the bailment has been accomplished, redelivered to the bailor, if such was the intention of the parties.

§ 18. **Delivery and acceptance.**—The property, the subject of the bailment must come to the possession of the bailee, and to that end there must be some sort of delivery, either actual or constructive. The very essence of the relation is possession, and so it may be said, as a general rule, that there must be an acceptance of the property on the part of the bailee; for one cannot be made a bailee against his will, and must have knowledge of the fact that he is in possession of the property.

While it is said that a bailment is a contract, and generally it is so conceded to be, it is not always so created; one may come to the possession of the property by finding, or even by stealing it, or it may be placed in his possession by mistake and not found by him until some time after; in all these cases the bailor had no intention of parting with the possession; there was no mutuality or meeting of minds upon that subject, but nevertheless the finder or the thief becomes a

<sup>13</sup> Duncomb v. N. Y. etc., R. Co., 84 N. Y. 190.

bailee; he may not be bound to continue the relation, but so long as he retains the possession he must care for the property, and for that care, according to the circumstances governing the case, he is liable to the owner or bailor. An example used by many of the authors on this subject is where one, by mistake, puts his purchased articles into another's wagon in the street, and the owner, without any knowledge of their presence, drives away with them. So long as he is ignorant of having them in his possession he is under no obligation to care for them; he may lose them by the grossest of carelessness upon his part, and he is not liable because he is not in any sense a bailee; but the moment he discovers the parcels, and has knowledge of the fact that he has them in his possession, from that moment he becomes a bailee, and is legally bound to care for them, and if lost, under certain circumstances would be liable to the owner.

§ 19. **A summary of some essentials.**—If the usual and ordinary essentials of a bailment were grouped together in one section they could no doubt be better understood. Following our definition they may be said to be: *First*. The parties to a bailment. Generally parties to a bailment relation must be persons competent to make a contract, but as we have seen the circumstances of obtaining control of the property may constitute persons parties to a bailment relation who are not competent to make a contract.

*Second*. The delivery of the possession of the thing. There must be an actual delivery of the property constituting the subject of the bailment. A manual delivery, if possible, but, if because of the nature of the property it cannot be so delivered, then the best delivery it is susceptible of. The delivery must be such in every case as will give the bailee absolute and complete control of the possession of the property bailed. A control, as we shall see, that cannot, during the existence of the relation, be interfered with even by the owner to the exclusion of the bailee except where the bailment is a gratuitous bailment and for the sole benefit of the bailee. It is this that characterizes the relation and distinguishes it from a gift or a sale.

*Third*. The delivery is in trust and the purpose and object of the bailment declares and fixes the trust. It may be a delivery of property for use or for custody and care, or upon which labor or skill is to be performed and in its changed or improved

condition redelivered to the bailor, or it may be a delivery of property to a factor to be sold in the market; whatever the object or purpose of the bailment, it defines and fixes the duty and liability of the bailee.

*Fourth.* The particular object or purpose of the bailment must be expressed or understood by the parties and the bailment must be a lawful one and one for which the thing delivered is fit. The bailor, as we shall see, must exercise good faith in this particular, having regard not only to the fitness of the thing for the purpose for which it is bailed, but to safety in using it for that purpose.

*Fifth.* A contract expressed or implied to conform to the object or purpose of the bailment.

The definiteness of the contract in this respect is an important essential in constituting a bailment relation. What is to be the use of the property and what disposition is to be made of it at the conclusion of the relation? Is it to be redelivered to the bailor or by some process of manufacturing changed in its nature and the changed product redelivered, or is it to be sold in the market. It is this essential part that has much to do with fixing the duties and liability of the bailee. For if he has failed to conform to the object of the bailment he becomes liable for its conversion and an action for the value of the property can be sustained by the bailor.<sup>19</sup>

§ 20. **Title of the bailor.**—Absolute title or ownership of the property by the bailor is not essential. The bailment relation is founded upon a possessory right, and so one who has a special property merely in the subject of the bailment, as the right to the possession and use of the thing, may bail the property. The finder of property has the right to the possession of it against all the world except the owner of it, and so may be the bailor of the property. Even a thief may make a bailment of the stolen property, and, if the owner does not interfere, may recover it from the bailee, if at the termination of the bailment he should refuse to redeliver it to him. It is well settled that a bailee cannot dispute his bailor's title; having received the property bailed from the bailor, he cannot, while holding it as a bailee, deliver it to another person. In *Bursley*

<sup>19</sup> Hall v. Corcoran, 107 Mass.251, 9 Am. 30.

*v. Hamilton* <sup>20</sup> it was held that an owner of property, giving a receipt for it to an officer who has seized it under process, could not set up title in himself, when sued by the officer, without first restoring the property to the officer.

§ 21. Bailor may sell or incumber property—Title of bailee.—The bailee has a title only commensurate with the object of the bailment; a right to the possession and use of the property, fixed by, and coextensive with, the contract of bailment; he cannot sell or in any way incumber the property, for should he attempt to do so he would violate the very essence and right to continue the bailment. But the bailor may, subject to the bailee's rights to carry out the bailment, sell all his right, title and interest in the property or thing bailed, or he may mortgage it, or in any way incumber it, and, upon notice, the bailee would be bound to respect the rights of the vendee or mortgagee.

§ 22. Bailor must exercise good faith—Must not expose bailee to danger.—It is the duty of the bailor to exercise good faith toward the bailee by giving him notice of all the faults of the thing bailed, within his knowledge, that might result in exposing the bailee to danger, and if he fails to do so, and by reason of it the bailee is injured, the bailor will be liable. As, for example, if the bailor should loan a vicious horse, it is his duty to notify the bailee of the fact, and if by reason of the bailor's failing to give such notice the bailee should be injured, he may recover damages of the bailor.

§ 23. Bailment or sale.—Both a bailment and a sale are the result of contract between the parties; to accomplish either the minds of the parties must meet. It would therefore follow that, to determine whether the personal transaction is a bailment or a sale, it is necessary to discover the intention of the parties, for their intention must govern.

There is no fixed rule or settled form of words by which it can always be determined whether the transaction is a bailment or a sale, and it is often difficult to conclude from the facts what was really intended by the parties. If the identical property

<sup>20</sup> 15 Pick. (Mass.) 40; *Knight v. Davis Carriage Co.*, 18 C. C. A. 278, 71 Fed. 662. May maintain trespass or trover. *Hollenbeck v. Todd*, 19 Ill. App. 452; *McGraw v.*

*Patterson*, 47 Ill. App. 87; *Harrington v. King*, 121 Mass. 269; *Rode v. Lee*, 102 Cal. 583, 36 Pac. 936.

is to be returned, or the same property in a changed condition, or the natural product of the same property, the transaction is a bailment.

But where by the contract or undertaking the title passes or there is a delivery of the property and no obligation to return it either in specie or the product of it, but the receiver may appropriate it and return in payment therefor some other thing of the same kind, or pay for it in money, it is a purchase and not a bailment. The test seems to be, does the title to the property pass to the person receiving it, if it does it is a sale; if it does not, but the same property in specie or the product of it, as where the flour from the wheat delivered to the miller, or the clothing manufactured from the cloth delivered to the manufacturer, is to be redelivered to the bailor, it is a bailment.

In *Lyon v. Lennon*<sup>21</sup> wheat was delivered to the defendant who gave the following receipt: "Received of Harry Lyon, 53 bushels, 50 pounds of wheat. Not transferable without notice." The testimony given in explanation of the receipt and the transaction disclosed that the defendant was in the habit of receiving wheat at his elevator and giving receipts therefor, on presentation of which it was understood he would pay the then market price for the same. The court held the transaction a sale. Where grain is received by a dealer under a contract, either express or implied, to pay the person delivering it the market price whenever he chooses to demand it, and such grain is mixed with other of like quality in bins from which shipments are being made daily, there being no understanding that the owner shall have the right to demand either his own or a like quality of other grain in return, the dealer becomes the owner of the grain and is liable to pay for it whenever called upon. In such a case the contract from the beginning furnishes the criterion by which the price is to be fixed, and it is not invalid.<sup>22</sup>

<sup>21</sup> 106 Ind. 567.

<sup>22</sup> In doubtful cases the intention of the parties must determine. *Edward's Appeal*, 105 Pa. St. 103; *Eulow v. Klein*, 79 Pa. St. 488; *Mack v. Snell*, 140 N. Y. 193; *Norwegian Plow Co. v. Clark*, 102 Ia. 31, 70 N. W. 808; *McConnele v. Hughes*, 29 Wis. 537; *Richardson v. Olmstead*, 74 Ill. 213. In *Nel-*

*son v. Brown*, 44 Ia. 455, the court held that a contract acknowledging the receipt of grain for storage, "loss by fire and the elements at the owner's risk," with the option of the party receipting it to return grain of equal test and value, constitutes a contract of bailment which is converted into a sale whenever the bailee dis-

§ 24. — **Commingleing of grain on storage.**—These contracts more often arise in the business of warehousemen or elevator companies, or where grain is stored with mill owners, where the grain delivered is mingled with other grain of the same grade and kind in one common mass and not kept separate for each owner. In such case it is held, if the commingled mass has been delivered on simple storage, each party is entitled on demand to receive his share; if for conversion into flour, each is entitled to his proper share of the product.<sup>23</sup>

And where a milling firm received a quantity of wheat and gave receipts therefor, stating that it had been received at the owner's risk from farmers and at a certain rate when sold to them, but no charge was made for storage, and the millers used the wheat in their business, and it became a part of their current consumable stock and its identity was lost, it was held that in the absence of legal usage, or a course of dealing between the parties to the contract, the receipt should be construed as evidence of a bailment and not of a sale.<sup>24</sup> But where grain is delivered to a warehouseman who is also a miller, with the understanding that it is to be mixed with the miller's own wheat and ground into flour in the usual course of his business, and the flour made therefrom is to be his own property, such a transaction is a sale.<sup>25</sup> Where the warehouseman was author-

poses of the grain. Cases holding bailment not a sale: *Strum v. Baker*, 150 U. S. 312; *Hunt v. Wyman*, 100 Mass. 198; *Collins v. Belfonte Centr. R.*, 171 Pa. St. 243; *Union Stock Yards Co. v. Western Land, etc., Co.*, 59 Fed. 49; *Sun Printing, etc., Co. v. Moore*, 183 U. S. 642. Cases holding sale not a bailment: *Peoria Mfg. Co. v. Lyons*, 153 Ill. 427; *Herford v. Davis*, 102 U. S. 235; *Smith v. Estate of Smith*, 91 Mich. 7.

<sup>23</sup> Where grain is delivered on a contract of bailment, the mere fact that it was mixed with other grain with the knowledge of the bailor does not convert the transaction into a sale, and the bailee of the whole has no greater control of the mass than if the share

of each were kept separate. *Chase v. Washburn*, 1 Ohio St. 244, 50 Am. Dec. 630; *Andrews v. Richmond*, 34 Hun (N. Y.), 20; *James v. Plank*, 48 Ohio St. 255.

<sup>24</sup> *Ledyard v. Hibbard*, 48 Mich. 421, 42 Am. Rep. 474.

<sup>25</sup> The mere fact that grain delivered on a contract of bailment is mixed with other grain, with the knowledge of the bailor, does not convert the transaction into a sale; in such case the bailee of the whole has no greater control of the mass than if the share of such were kept separate. *Bretz v. Diehl*, 117 Pa. St. 589, 2 Am. St. Rep. 706. A delivery of wheat to an elevator for which the owner takes a receipt signed by the elevator company stating that it had

ized to sell only his own portion of the common mass, and was required to keep at all times an amount on hand to satisfy all depositors, it was held that the transaction was a bailment.<sup>26</sup>

Plaintiffs delivered grain to defendant at his elevator and received from him a memorandum that it was "bought at owner's risk as to fire," but specifying no price, the grain being placed by himself in a separate bin. Subsequently the defendant made an offer for it which the plaintiffs refused, and afterwards the elevator and grain were destroyed by fire without defendant's fault. It was the custom to receive grain in this manner, and afterwards to buy or return it. It was held that the defendant was not liable for the loss.<sup>27</sup>

And where a contract by which several farmers were to deliver to a designated firm, at a factory previously owned and controlled by the farmers, specified vegetable products at designated prices, which the firm agreed to take and pay for at certain times, and if necessary make additions to the factory at a cost not to exceed a specified amount, to be deducted from the net profits, each farmer to receive a specified per cent. *pro rata* according to the amount of produce delivered by him at the factory in addition to the price agreed upon, it was held that the contract was one of bailment and not of sale.<sup>28</sup>

And a delivery of wheat to an elevator company for which the owner, after stating that he did not wish to sell, took a receipt stating the number of bushels delivered, was held to constitute a bailment and not a sale of the wheat, notwithstanding a custom in the neighborhood to regard such transactions as sales, unless the custom was known to the owner of the wheat and he understood that he was dealing in accordance therewith.<sup>29</sup>

"bought a certain quantity of wheat of him," but which had stamped on it the words: "Stored not transferable," constitutes a bailment of the wheat so delivered. *Weiland v. Sunwall*, 63 Minn. 320, 65 N. W. 628; *Weiland v. Krejnick*, 63 Minn. 314, 65 N. W. 631.

<sup>26</sup> *Andrews v. Richmond*, 34 Hun (N. Y.), 20; *James v. Plank*, 48 Ohio St. 255 (distinguishing

*State v. Washburn*, 1 Ohio St. 244).

<sup>27</sup> *Irons v. Kentner*, 51 Iowa, 88, 33 Am. Rep. 119; *State v. Stockman*, 30 Oreg. 36, 46 Pac. 851.

<sup>28</sup> *Satles v. Hallock*, 44 N. Y. Supp. 543.

<sup>29</sup> *Weiland v. Krejnick*, 63 Minn. 314; *Weiland v. Sunwall et al.*, 63 Minn. 320, 65 N. W. 628; *Barnes v. McCrea*, 75 Iowa, 267, 9 Am. St. Rep. 473, 39 N. W. 392.



And where plaintiffs delivered grain to an elevator company under an alleged oral agreement that it was to remain in the elevator until the plaintiffs were ready to sell it, and that the elevator company was then to have the grain if it would pay as much as was paid by others, and in case it did not buy it was to have one cent per bushel for weighing the grain in and out, plaintiffs knowing that the grain so delivered was mixed in a mass with other grain, and that the company was accustomed to ship from the mass whenever the prices suited them, and the plaintiffs could not have understood that the identical grain was in any case to be returned to them, it was held that the true meaning of the contract was that the elevator company was to have the option to pay the best market price for the grain whenever plaintiffs desired to close the transaction, or return to them an equal quantity of similar grain, and that it was a contract of sale and not of bailment.<sup>30</sup>

§ 25. **A bailment, a sale, or a gift.—How determined.**—From what has been said and from the examples noted, it may be determined that the bailee is only entitled to the possession of the property which is finally to be redelivered to the bailor; that the title to the property does not pass to the bailee but remains in the bailor, while in a sale there is a transfer of the absolute title in the property or thing for a price in money. And so in case of a gift the title of the property passes upon delivery, while in bailment the title of the property remains in the bailor, and the possession, or the right to possession, only, passes to the bailee.

<sup>30</sup> *Barnes Bros. v. McCrea & Co.*, 75 Iowa, 267; and see cases cited; *O'Dell v. Leyda*, 46 Ohio St. 244, 20 N. E. 472; *Pontiac Nat. Bank v. Lungan*, 28 Ill. App. 401; *McGrew v. Thayer*, — Ind. —

(1900), 57 N. E. 262; *Baker v. Born*, 17 Ind. App. 422, 46 N. E. 930; *Yockey v. Smith*, 181 Ill. 564; *State v. Cowdrey*, 79 Minn. 94, 48 L. R. A. 92.

## CHAPTER II.

### OF THE CLASSIFICATION OF BAILMENTS.

§ 26. Roman classification adopted by authors.	cludes earlier classification.
27. Modern classification upon the theory of recompense or no recompense.	29. The most general subdivision of bailments.
28. Modern classification in-	30. Chart showing classification of bailments.

§ 26. Roman classification adopted by authors.—To Lord Holt, Sir William Jones and Judge Story are we indebted for that thorough classification of this subject that has been recognized by every author that has written upon it. They followed, in large degree, the Roman system, and adopted the Roman names given to the different kinds of bailments, which have been so thoroughly woven into our laws that now they are recognized as a part of it. Following this system, the divisions of the law of bailments usually adopted may be said to be as follows:<sup>1</sup>

- I. *Depositum*: A naked bailment of personal property to be kept by the bailee without recompense and returned to the bailor when the purpose of the bailment has been accomplished.
- II. *Mandatum*: A mandate, or the bailment of personal property, as to which the bailee undertakes without recompense to do something.
- III. *Commodatum*: A loan for use, or the bailment of personal property borrowed or used by the bailee without reward; but in our law, of course, to be restored in specie.
- IV. *Pignus*: A pledge or pawn, or the bailment of personal property to a creditor as security for some debt or engagement.
- V. *Locatio conductio*: A hiring which is always for some reward.

Judge Story divides the *locatio* bailments into four subdivisions:

- I. *Locatio rei*: The hiring of a thing for use.
- II. *Locatio operis faciendi*: The hiring of work and labor upon a thing.

<sup>1</sup> Story on Bailm. secs. 4, 5, 6, etc.

III. *Locatio custodiae*: The hiring of care and service to be performed or bestowed on the thing delivered.

IV. *Locatio operis mercium vehendarum*: The hiring of the carriage of goods from one place to another.<sup>2</sup>

§ 27. **Modern classification upon the theory of recompense or no recompense.**—That the classifications of these early authors were not only comprehensive, but have been of inestimable value to the development of the law of bailments, there can be no doubt; but the more modern theory has been to classify along the line of gratuitous and nongratuitous bailments. Is the bailment for the sole benefit of the bailor, for the sole benefit of the bailee, or for the mutual benefit of both parties?

This modern classification, however, is but a remodeling of the former and earlier one, and is used, and is principally important, for the purpose of illustrating in a concise manner the liability and duty devolving upon the parties to the bailment.

§ 28. **Modern classification includes earlier classification.**

I. A bailment for the sole benefit of the bailor includes (a) *Depositum*, (b) *Mandatum*.

II. A bailment for the sole benefit of the bailee includes *Commodatum*.

III. A bailment for the benefit of both bailor and bailee includes (a) *Pignus*, (b) *Locatio Conductio* with all of the subdivisions made by Judge Story.

§ 29. **The most general subdivision of bailments.**—The most general classification of bailments is that which divides the subject into (1) Ordinary Bailments, and (2) Exceptional Bailments.

(1) The ordinary bailment is one in which the rights and liabilities of the parties are determined by the benefit or compensation received and the negligence or diligence of the bailee in the particular case, as for example, if the bailment is for the sole benefit of the bailor the law requires of the bailee slight diligence and he is held liable for gross negligence; if the bailment is for the sole benefit of the bailee he is required to exercise high diligence and is liable for slight negligence; if the bailment is for the benefit of both parties the bailee is required to exercise ordinary diligence and is liable for ordinary negligence.

(2) Exceptional bailments belong to the non-gratuitous

<sup>2</sup> Story on Bailm. sec. 3.

class, bailments for the benefit of both parties; but because of their exceptional character the law requires of the bailees more than ordinary duties and a much greater degree of diligence than ordinary diligence. The bailees in this class of bailments are (a) postmasters, (b) innkeepers, (c) common carriers. The reason for requiring the exceptional duties and a greater degree of diligence in these cases arises in the demands of public policy.

(a) *Postmasters* are public servants answerable to the individuals who may suffer because of their negligence as well as the public authority which has supervision over them. Because of this it would seem they are classified as exceptional. The diligence, however, required is no greater than ordinary but the duties are public and exceptionally important.\*

(b) *Innkeepers* are classified as exceptional because of their relation to the public and their guests. While in a certain sense they pursue a private business in that they furnish their own place for carrying it on and rely upon the compensation collected from their patrons to support it they are nevertheless to a great extent public servants depending upon the public for support and in turn guaranteeing to all who come to the inn as guests, care and protection. Because of this and the submission of the guest to their care and the placing of his baggage and personal effects in the control of the innkeeper the law has determined that the liability shall be more than that of an ordinary bailee, that it shall be in the nature of a insurer.

(c) *Common carriers* belong peculiarly to the exceptional class of bailments. Whether the subject of the carriage be freight or passengers dependance for safety and delivery at the destination is essentially upon the carrier. The business, while to a certain extent private, in that the carrying facilities are private property and the undertaking is supported and carried on at the expense of the carrier, to a much more important extent it is a public business, and public policy demands that it be subject to laws and regulations that will vouchsafe to those who patronize the carrier a sufficiently high degree of diligence to protect life and property and so this bailment relation is not left in the ordinary classification, requiring only ordinary care, but a greater diligence is required, it is placed in the class of exceptional bailments.

\* *Post*, sec. 388.

## § 30. Chart showing classification of bailments.—

BAILMENTS.					
(1) GRATUITOUS.			(2) NON-GRATUITOUS.		
(1) FOR THE SOLE BENEFIT OF THE BAIOR.		(2) FOR THE SOLE BENEFIT OF THE BAILEE.	(3) FOR THE BENEFIT OF BOTH BAIOR AND BAILEE.		
(1) DEPOSITUM.	(2) MANDATUM.	(1) COMMODATUM.	(1) PIGNUS, PLEDGE OR PAWN.	(2) LOCATIO ET CONDUCTIO.	(3) EXCEPTIONAL LOCATIO BAIL- MENTS.
Deposit of a thing to be kept gratuitously and returned to bailor at termination of bailment.	Delivery of a thing upon which the bailee is to do some work gratuitously and return it to the bailor,	Lending of a thing to bailee for his use and enjoyment without recompense.	Pledging a thing as security for payment of some debt or the performance of some undertaking or obligation.	A hiring—which is always for reward: (1) Hiring a thing for use. (2) Hiring of work and labor on a thing. (3) Hiring of care and custody of a thing. (4) Hiring of the carriage of a thing from place to place.	(1) Postmasters. (2) Innkeepers. (3) Common carriers.
Gratuitously to carry it from place to place for the bailor as directed.					

# CHAPTER III.

## OF THE RIGHTS, DUTIES AND LIABILITIES GENERALLY OF BAILOR AND BAILEE.

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| <p>§ 31. Object of chapter.</p> <p>32. Gratuitous and non-gratuitous bailments.</p> <p>33. Consideration supporting the contract.</p> <p>34. Negligence or diligence.</p> <p>35. Chart showing duties and liabilities.</p> <p>36. What is diligence and what is negligence.</p> <p>37. Definition generally accepted.</p> | <p>§ 38. Every case ruled by its own circumstances.</p> <p>39. High diligence—Gross negligence.</p> <p>40. Negligence and fraud distinguished.</p> <p>41. Diligence and negligence—Questions of law and fact.</p> <p>42. Classification of conditions and circumstances.</p> |
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§ 31. **Object of chapter.**—It is not our intention under this head to go fully into the discussion of the rights, duties and liabilities of the parties to a bailment, but simply to call attention to some of the general doctrines touching upon that subject, and to determine more particularly the rules governing the same.

§ 32. **Gratuitous and non-gratuitous bailments.**—One of the most important subdivisions of bailments is that dividing them into (1) gratuitous, and (2) non-gratuitous bailments.<sup>1</sup> Upon these subdivisions rest very largely the determination of the diligence required of the parties in each individual case and their liability for negligence. It has become a settled doctrine of the law of bailments in ascertaining the rights, duties and liabilities of the parties to the relation, to determine, (1) was the bailment for the sole benefit of the bailor, or (2) was it for the sole benefit of the bailee, or (3) for the benefit of both. These questions determined, the law fixing the liability may be applied.

§ 33. **Consideration supporting the contract.**—The bailment relation is one of contract and must rest upon a legal consideration. Where the bailment is for the benefit of both parties, there is no difficulty in determining a valid consideration mov-

<sup>1</sup> *Ante*, sec. 30.

ing between the parties, and where it is for the sole benefit of the bailee it is apparent that the benefit supports the legal obligation to carry out the purpose and duties of the contract; but in cases of gratuitous bailments solely for the benefit of the bailor much discussion has been had in determining the question of consideration. Some of the courts have held that there is no contract binding upon the bailee because he receives no consideration; that as he is to receive no benefit from the acceptance of the goods, the subject of the bailment, the presumption is against his having intended to accept the delivery of the property in exchange or consideration for any promise, express or implied.<sup>2</sup> In some of the earlier cases this doctrine was accepted, but was never generally adopted, and it may be said that the great weight of authority is overwhelmingly against it, and it has long been settled that the delivery of the property is a sufficient consideration for the contract by the depository or mandatory if accepted by him for the purposes of the bailment.<sup>3</sup> As said by some of the courts, the very confidence reposed by the bailor in the bailee is a sufficient consideration to hold the latter to a proper execution of the trust: or, as was said by Lord Holt in the celebrated case of *Coggs v. Barnard*, "the owner trusting the bailee with the goods is a sufficient consideration to oblige him to a careful management."<sup>4</sup>

§ 34. **Negligence or diligence.**—Coupled with the question of benefit is the question of negligence or diligence; for the receiving of benefits brings the requirement of diligence, and the absence to a certain extent excuses negligence. If, for example, the bailee is to receive no compensation and no benefit, and the bailment relation is solely for the benefit of the bailor, a "*depositum* or a *mandatum*," the law does not require of the bailee so high a degree of diligence as it would in case of *commodatum*, where the benefit is entirely for the bailee, and no benefit whatever to the bailor. And so the duties and liabilities of the bailee, when there is no special contract, depend

<sup>2</sup> *Thorn v. Deas*, 4 John (N. Y.) 84; *McGee v. Bast*, 6 C. J. Marsh. (Ky.), 453; Story, Bailments, §§ 31, 137, 140, 166, 169.

<sup>3</sup> *McDaniels v. Robinson*, 26 Vt. 316; *McCawley v. Davidson*, 10 Minn. 478.

<sup>4</sup> *Coggs v. Bernard*, 2 Lord Ray. 909; *Young v. Noble*, 2 Disney (Ohio), 485; *Kinchloe v. Priest*, 89 Mo. 240, 58 Am. Rep. 117; *Walden v. Karr*, 88 Ill. 49.

almost entirely upon the benefit received, and the diligence he has shown or the negligence he is guilty of. If the bailment, for example, is for the sole benefit of the bailor, the law only requires of the bailee slight diligence, and holds him liable for gross negligence. If for the sole benefit of the bailee, then he is held to high diligence, and liable for slight negligence; if for the benefit of both bailor and bailee, ordinary diligence and ordinary negligence.<sup>5</sup>

\* Where bailment is for the sole benefit of the bailor only slight diligence is required. Liable for gross negligence. A gratuitous bailee of a special deposit held subject to this rule. *Gerish v. Savings Bank*, 138 Mich. 46; *Whitney v. First National Bank*, 55 Vt. 154, 54 Am. Rep. 598; *Davis v. Gay*, 141 Mass. 531; *Hibernian, etc. Ass'n v. McGrath*, 154 Pa. St. 296, 35 Am. St. Rep. 828, 26 Atl. 377; *Griffith v. Zipperwick*, 28 Ohio St. 388; *Smith v. Elizabethport Bank Co.*, 55 Atl. 248 (N. J.). Where the bailment is for the sole benefit of the bailee high diligence is required of him, and he is liable for slight negligence. *Hagabush v. Rayland*, 78 Ill. 40; *Wood v. McClure*, 7 Ind. 155; *Green v. Hoggingsworth*, 5 Dana (Ky.), 173. Where bailment for the benefit of both parties, bailee must exercise ordinary diligence, and is liable for ordinary negligence. *Fairmont Coal Co. v. Jones & Adams*, 67 C. C. A. 265, 134 Fed. 711; *Hunter v. Ricks Bros.*, 127 Iowa, 108, 102 N. W. 826; *Eastman v. Patterson*, 38 Vt. 146; *Brown v. Patterson*, 10 Cush. (Mass.), 117; *Gleason v. Beers*, 59 Vt. 581, 59 Am. Rep. 757, 10 Alt. 86; *Bunnell v. Sterne*, 122 N. Y. 539, 19 Am. St. 519; *Woodruff v. Painter*, 150 Pa. St. 91, 30 Am. St. Rep. 786, 24 Atl. 621; *Walport v. Bohn*, 126 Ga. 532, 55 S. E. 181; *Union Stock Yards Co. v.*

*Mallory*, 157 Ill. 554, 48 Am. St. 341; *Onderkirk v. Bank*, 119 N. Y. 263; *Bowman v. Western Fur Co.*, 96 Iowa, 188, 64 N. W. 775, 777; *Wamser v. Browning, King & Co.*, 95 N. Y. Supp. 1051. Presumption of want of care when the subject of the bailment is injured while in bailee's custody by an accident such as in the ordinary course of things does not happen when due care is exercised. *Swenson v. Suave etc., Co.*, 145 Fed. Rep. 727; *Powers v. Jughardt*, 91 N. Y. Supp. 556. Total failure to redeliver or account for goods by bailee to whom intrusted for delivery, *prima facie* evidence of negligence. *Simonoff v. Fox*, 91 N. Y. Supp. 757. When the bailed property is destroyed, the burden of proof is on the bailee to overcome the presumption that the destruction arose from lack of ordinary care; but when he shows that it occurred from operation of forces not within his control, the case is at an end unless the bailor either disproves the claimed cause of the loss, or shows want of ordinary care co-operating with such destroying cause. *Hunter v. Ricks Bros.*, 127 Iowa, 108, 102 N. W. 826; *Schropshier v. Sidebotton*, 30 Mont. 406, 76 Pac. 941; *Jackson v. McDonald*, 57 Atl. 126; *Frankhouser v. Wagner*, 62 Ill. 59. *Contra*, see *Winteringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999.



§ 35. Chart showing duties and liabilities.—The rights, duties and liabilities of the parties, bailor and bailee, the degree of diligence to which they are held, and of negligence for which they are liable, may be shown by the following chart:

IF BAILMENT FOR	MUST EXERCISE	LIABLE FOR
Sole benefit of bailor, a <i>depositum</i> or <i>mandatum</i> .	SLIGHT DILIGENCE	GROSS NEGLIGENCE
If for sole benefit of bailee, a <i>commodatum</i> .	HIGH DILIGENCE	SLIGHT NEGLIGENCE
If for the benefit of both bailor and bailee, a <i>pignus</i> . <i>Locatio rei</i> . <i>Locatio operis faciendi</i> . <i>Locatio custodiae</i> . <i>Locatio operis mercium vehendarum</i> .	ORDINARY DILIGENCE	ORDINARY NEGLIGENCE

§ 36. What is diligence and what is negligence.—It is a difficult matter to give a definition of diligence or negligence, or of high diligence or gross negligence, as applied to the law of bailments. Negligence and diligence are relative terms, and depend upon the circumstances of the particular case; what would be diligence in one case would be far short of it in another.

As, for example, it would not be considered negligent for a workman to smoke a cigar in a foundry, but if he were to do so in a powder-mill it would be the grossest of negligence. So, while one might be said in the one case to be exercising ordinary diligence, in the latter he would be guilty of gross negligence.

So, one driving a span of horses to a wagon in the country where there were few, if any, using the highway, it might be said that very fast driving would be ordinary diligence, but as he approached a crowded city a much greater caution would be required, and the driving at a high rate of speed on a crowded city street would be gross negligence. So we see that

very many elements of fact enter into the determination of the question.

§ 37. **Definition generally accepted.**—A definition generally accepted by authors and the profession is, “ordinary diligence is that care and diligence which an ordinarily prudent man, under like circumstances, would exercise in matters of his own concern.”\*

§ 38. **Every case ruled by its own circumstances.**—And so it may be seen that each and every case must be ruled by its own facts and circumstances. The advent of every new invention, the discovery of every new and important force that is appropriated by man and made subservient to the great on-marching industries in these days of progress, bring with them new and varied circumstances and conditions which must be considered in defining and determining what is negligence and what is diligence in the given case. The principles of law, settled and staid, remain the same, but the facts are new and continually changing, and we are called upon to marshal and classify them, and apply the governing rules of law.

§ 39. **High diligence—Gross negligence.**—We have defined diligence by adopting the usual definition of that term, and have seen that it is a relative term. So high diligence and gross negligence are alike relative terms and are subject to the same discussion and examples for explanation. At the most, we can only say that high diligence is more than ordinary; slight diligence less than ordinary diligence, and gross negligence is the want of slight diligence, varying in degree according to the elements of carefulness or want of care.

The degrees of diligence or negligence can only be defined by comparison with that diligence which is usually exercised by the ordinarily prudent man in caring for his own under

\* *Ruggles v. Fay*, 31 Mich. 141; *Maynard v. Buck*, 100 Mass. 40; *Wood v. Remick*, 143 Mass. 102; *Clayton v. Steiger*, 139 Ill. 41, 28 N. E. 987; *Casey v. Suter*, 36 Md. 1; *Swentzel v. Bank*, 147 Pa. St. 140, 23 Atl. 405, 30 Am. St. 718, 15 L. R. A. 305, and note citing cases. That the bailee exercises the same care of the bailment that he does of his own property of

like nature, not sufficient, for he may not be an ordinarily prudent man. *Ray v. State Bank*, 10 Bush (Ky.), 344; *Carlisle, etc., Bank v. Graham*, 79 Pa. St. 106, 21 Am. Rep. 49, 53. Where it is held that ordinary diligence is not measured by the standard of care the bailee takes of his own property, but by the care exercised by ordinarily prudent men as a class.

like circumstances. High diligence is a degree of carefulness greater than that care usually exercised by the ordinarily prudent man, as above stated, while slight diligence is not so much as ordinary. Gross negligence is a lesser degree of care than slight negligence, and slight negligence is less than ordinary care, and greater than gross negligence. And so it can be seen it would be exceedingly difficult to accurately define degrees of diligence or negligence, for every case depends on its particular facts.<sup>7</sup>

Mr. Justice Bradley in the case of *Railway v. Lockwood*<sup>8</sup> in discussing this question said: "The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due and he fails to come up to the mark required, it is called slight diligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence . . . and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far, since the requirement of different

<sup>7</sup> What constitutes ordinary care or ordinary negligence varies with each individual case. *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769. See note and cases cited in L. R. A.; *Preston v. Prather*, 137 U. S. 604, 34 L. Ed. 788. Where the whole subject of diligence and negligence is very

generally discussed, and where it is said that the care of the property must be graduated according to the value of the property, the convenience of its being made secure, the facilities for its being stolen, and the temptation thereto.

<sup>8</sup> 17 Wall. (U. S.), 382.

degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed.

"The compilers of the French Civil Code undertook to abolish these distinctions by enacting that 'every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.' Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice."

In *Huiton v. Dibbons*\* Lord Denman said: "It may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists."

And in *Wilson v. Britt*<sup>10</sup> Rolfe, B., said: "I could see no difference between negligence and gross negligence; that it was the same thing with the addition of a vituperative epithet."

But for all the criticism of learned jurists, the fact still remains that the law for all time, since the days of Lord Holt, has recognized these different degrees, and it is often found necessary to distinguish the difference in degrees under certain facts and circumstances.<sup>11</sup>

§ 40. *Negligence and fraud distinguished.*—While gross negligence may be evidence of fraud, it is not always fraud. The distinction between negligence and fraud is very marked, and it will not do to carry the often repeated doctrine that gross negligence on the part of a gratuitous bailee is in legal effect a fraud beyond what the statement really implies. Fraud is generally positive and is coupled with an intent to commit a wrong, while negligence is an omission to perform a duty. One, as has been said, is in the nature of a malfeasance while the other is misfeasance. This distinction was well stated in *Gardner v. Heartt*.<sup>12</sup> The court said: "Fraud and negligence are by no

\* 2 Q. B. 646.

<sup>10</sup> 11 M. & W. 113.

<sup>11</sup> *Whitney v. Lee*, 8 Metc. 91; *Mason v. St. Louis, etc., Co.*, 60 Mo. App. 93; *Carlisle, etc., Bank v. Graham*, 79 Pa. St. 106, 21 Am. 49. In *Beal v. South Dover R. R. Co.*, 11 L. T. Rep. (N. S.) 184, 3 H. & C. 337, 341, it was said that although there may be difficulty in

defining what gross negligence is there is a certain degree of negligence to which everyone attaches great blame; and that it is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.

<sup>12</sup> 8 Denio (N. Y.), 232-236. In *Carlisle, etc., Bank v. Graham*, 100

means identical in their nature or effect. Fraud is a deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. It is always positive; the mind concurs with the act; what is done, is done designedly and knowingly. But in negligence, whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty. There is, however, an absence of proper attention, care or skill. It is strictly nonfeasance, not malfeasance. This is the general idea, and it marks the distinction between negligence and fraud. In the first, there is no positive intention to do a wrongful act; but in the latter, a wrongful act is ever designed and intended. Negligence, in its various degrees, ranges between pure accident and actual fraud, the latter commencing where negligence ends. Negligence is evidence of fraud, but still is not fraud."

**§ 41. Diligence and negligence—Questions of law and fact.**—Diligence or negligence is generally a mixed question of law and fact. The degree of diligence required in a given case to be exercised by the bailee or the degree of negligence that will render him liable are questions of law for the court; whether it has been proven in the case that the bailee has exercised the degree of diligence required and defined by the court as required or is guilty of that degree of negligence the court has determined will render him liable, are questions of fact for the jury. In other words, the principles of law that govern the case as to the degree of diligence required or the degree of negligence that will render the bailee liable are for the court; the facts that determine whether the bailee has exercised that diligence or

U. S. 699, it was held that gross negligence may be and often is consistent with good faith and honest intention. The court say: "The authorities are numerous, and the language of judgments various, but for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill and diligence is gross negligence. What is reasonable varies in the case of bailees and that of bailees for hire. From the former is reasonably ex-

pected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected such as is exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment." It may, however, furnish evidence of fraud. *Tudor v. Lewis*, 3 Metc. (Ky.), 378.

been guilty of the negligence explained and defined by the court are for the jury. As has been said, what is due care is a question of law to be decided by the court; whether the bailee has exercised such care is a question of fact for the jury.<sup>13</sup>

Circumstances may exist that would require the court to determine the whole matter; as, for example, if the facts were such that every fair and reasonable-minded man could draw but one conclusion, such that among fair and reasonable men there could be no difference of opinion, then in such case there would be nothing for the jury, and the court would determine the whole matter as a question of law. Such a case would, however, very seldom arise.

§ 42. **Classification of conditions and circumstances.**—Much has been said and written by law writers and courts of last resort by way of classifying the several conditions and facts that aid in determining these questions.

“What constitutes ordinary diligence,” says Judge Story,<sup>14</sup>

<sup>13</sup> Rowland v. Jones, 73 N. C. 52; Fisk v. Forsyth Co., 57 Conn. 118. That negligence is a question of law and fact means nothing more than that it is a question for the jury under instructions of the court. Baltimore R. Co. v. State, 36 Md. 366; Nolan v. N. Y., etc., R. Co., 53 Conn. 461. In Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 118-122, the court say: “It is a mistake, therefore, to say, as is sometimes said, that when the facts are undisputed the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and

incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair minded men may well differ.”

<sup>14</sup> Story on Bailments, sec. 15. In Erie Bank v. Smith, 3 Brewster (Pa.), 9, it was held that what might be ordinary diligence in one country and in one age, might at another time and in another country be negligence or even gross negligence. In discussing Judge Story's definition the court say: “As, for instance, to give a homely illustration, in many parts of the interior of the country where thefts are rare, it is quite usual for people to leave their barns where horses and cattle are kept without being locked at night; and, indeed, it is not an uncommon thing for the dwelling houses in which the owner and his family and his treasure all are, to be left open and unlocked during all the night. In cities it would be

“may always be materially affected by the nature, the bulk, and the value of the articles. A man would not be expected to take the same care of a bag of oats as of a bag of gold; of a bale of cotton as of a box of diamonds or other jewelry; of a load of common wood as of a box of rare paintings; of a rude block of marble as of an exquisite sculptured statue. The value especially is an important ingredient to be taken into consideration upon every question of negligence; for that may be

deemed a great want of ordinary care to do that, although nothing might be easier than to pick the lock of a stable, or to wrench a padlock off a stable door or barn door. So, too, if robbers were known to frequent particular districts of the country, much greater precaution would be required on the part of the bailles or pawnees than in districts where robberies were rare occurrences. What then is usually done in a place in respect to things of like nature (which must be considered as done in reference to surrounding circumstances, in reference to the danger which threatens, in reference to the liability of loss), what is generally done in a place in respect to things of like nature, whether more or less in point of diligence, than is exacted in another place, becomes in fact, the general measure of diligence in that place, and continues the standard. ‘What constitutes ordinary diligence may also be materially affected by the nature of the articles—the bulk or value of the articles claimed to be pledged.’ This is very important; a man would not be expected to take the same care of a bag of oats as of a bag of dollars; of a bale of cotton as of a case of diamonds; of an ordinary block of marble as of an exquisitely sculptured statue. The baille, therefore, ought to pro-

portion his care to the value of the thing that is intrusted to him, and to the nature of it, because both as regards the value of the thing and the nature of it, upon that depends the injury or loss likely to arise to the party with whom he has dealt—to the borrower who has entrusted him with the thing. It is undoubtedly true that in the case of a pledge of this character it is not enough to say that the pawnee took the same care of the thing pledged as he did of his own goods, nor is it any answer to the demand of the pawnor or debtor, to show that his own property to an equal or greater amount was lost at the same time and by the same alleged negligence. He must go further than that, and satisfy the jury that there was ordinary diligence in keeping his own property. If it appears that he was not diligent in keeping his own property, that would be no excuse for negligence in keeping the property of others entrusted to him. Yet, nevertheless, as every man is presumed to exercise ordinary care of his own property until the contrary is shown, where the baille’s own goods or property are lost by the same occurrence, the same theft, the same fire, or whatever it may be that destroys it, in the absence of evidence there is a presumption in its fa-

gross negligence in the case of a parcel of extraordinary value which, in the case of a common parcel, would not be so. The degree of care which a man may reasonably be required to take of anything must, if we are at liberty to consult the dictates of common sense, essentially depend upon the quality and value of the thing, and the temptation thereby afforded to theft. The bailee, therefore, ought to proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part."

To the circumstances and conditions important in determining diligence or negligence in caring for the subject of the bailment, noted by Judge Story, might be added, the season of the year, the climate of the country, the time and place of doing the business; all these would be important elements to be considered. If the climate or season be cold or warm or if the country be one adapted to the business in hand. If the times and the place be propitious or otherwise, all would materially affect the successful carrying out of the object of the bailment. Failure in a given case to fully observe and provide for these conditions as they might exist might be gross negligence. Their observance as an ordinarily prudent man would observe them in matters of his own affairs would be ordinary diligence, and so what under certain conditions might be held to be ordinary diligence, under certain other of these conditions and at different times might be held to be gross negligence.

vor—a presumption that he used ordinary diligence as to his own goods. If it be a case in which there is no evidence at all on the subject of want of ordinary care on his part, the presumption in that case is that he did exercise the same diligence in regard to

the goods of others, entrusted to him as to his own goods—a presumption being nothing more than the result of common experience (common experience being the mother of all presumption) that, like all other men, he took ordinary care of his own interest."



## CHAPTER IV.

### SOME FURTHER GENERAL PRINCIPLES TOUCHING RIGHTS AND LIABILITIES OF PARTIES TO BAILMENTS.

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| <p>§ 43. An element of agency.</p> <p>44. Under circumstances may bind bailor.</p> <p>45. Right to use the property.</p> <p>46. Unwarranted use would render the bailee liable.</p> <p>47. Bailee may protect the property and his interest.</p> <p>48. Skilled bailee.</p> <p>49. Rule not always carefully stated.</p> <p>50. Special deposits in banks.</p> <p>51. — Determining negligence.</p> <p>52. Honesty and good faith demanded.</p> <p>53. Bailee may protect himself against claim of third parties.</p> <p>54. What would excuse liability.</p> <p>55. Unlawful tortious possession would render bailee liable for injury or loss.</p> <p>56. Rights and duties to third parties.</p> <p>57. Bailee against third parties.</p> <p>58. Modifying or enlarging responsibility by contract.</p> <p>59. How far can the bailee lessen his responsibility by contract.</p> <p>60. Redelivery to bailor.</p> | <p>§ 61. Not always required to redeliver the specific property.</p> <p>62. Excuses for non-delivery.</p> <p>63. Conversion of the property.</p> <p>64. Bailee's right to compensation and to a lien.</p> <p>65. Agreement for compensation, express or implied, necessary to create lien.</p> <p>66. If no statute or express contract giving bailee lien he may have common-law lien.</p> <p>67. Two kinds of liens.</p> <p>68. Delivery to the bailee for the purpose of the bailment necessary to the establishment of the lien.</p> <p>69. Possession of the property an essential.</p> <p>70. Finder of property—His compensation—Lien.</p> <p>71. Extinction of the lien—Payment or tender.</p> <p>72. The lien may be waived.</p> <p>73. Lien once lost cannot be revived.</p> <p>74. Right of the bailor to compensation.</p> <p>75. Enforcement of the lien of bailee.</p> |
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§ 43. An element of agency.—Where the bailee, acting within the scope of the bailment contract and in good faith, has found it necessary to make expenditures in order to preserve the subject of the bailment, as, for example, if the subject of the bailment be a valuable horse, and the horse should be

taken sick, the bailee would be justified in employing a veterinary and in purchasing medicine to restore the health of the horse. And should the horse break out of the inclosure by no fault of the bailee, and become impounded for damage done, the bailee would be expected to pay the damage. Acting in good faith, and within the reasonable scope and necessity of the bailment contract, expressed or implied, the bailee should pay necessary expenses and damages, and may recover the same from the bailor. In this respect the same rule applies that is applicable to principal and agent.

**§ 44. Under circumstances may bind bailor.**—And so under circumstances which make it reasonably necessary, the bailee may contract for the care of the bailed property in the name of the bailor, and the bailor will be bound to pay for the same. The law takes a broad common-sense view of the matter. If the property, the subject of the bailment, is animals, it is understood they must be fed and perhaps sheltered; if other property, perhaps insured;<sup>1</sup> so the bailee would have authority to do with the bailment what he would do under just such circumstances if it were his own.

**§ 45. Right to use the property.**—The general rule is if the purpose of the bailment is for custody and not for use, the bailee has no right to use the bailed property; he is simply to keep the property in his custody, and give it such care as good faith and reasonable and fair judgment demands. There are, however, exceptions to this rule, or at least apparent exceptions, in cases where the proper care of the property would require that it be used. As, for example, a milch cow; it would be the duty of the bailee to milk her at the usual time, indeed this would be required, and to fail to do this would render him liable in damages. A flock of sheep would require for proper care that their wool should be removed when the summer months come on. These cases could hardly be called exceptions to the general rule, because it is the kind of care that the property demands.

**§ 46. Unwarranted use would render the bailee liable.**—Should the bailee use the property to an extent unwarranted by the bailment, he would become liable to the bailor in an action for damages, and under certain circumstances for conversion

<sup>1</sup> *Fagan v. Thompson*, 38 Fed. 467; *Furnes v. Union Nat. Bank*, 147 Ill. 570.

of the property, depending somewhat upon the extent of the damage to the property.

The use to which the property may be put is often fixed by the contract of bailment, but if there is no expressed contract fixing the use of the property, then it must be determined by the attending circumstances, the nature of the property, and what might be reasonably presumed to be a proper and necessary use. As, for example, if the property bailed were a fine carriage team which were let to the bailee for the purpose of pleasure driving, and he should put them on a plow and work them upon a farm, there would be no difficulty in concluding that he was putting the bailed property to an unauthorized use.

A leading case upon the subject is that of *Alvord v. Davenport*,<sup>2</sup> where Mr. Justice Parke gives us a very clear discussion of the subject. He says: "The authorities seem to agree that the right of the bailee to use the property, in the absence of express contract on the subject, depends on the circumstances of the case, the character and purpose of the bailment, the nature of the property in connection with the other attending circumstances. One test or principle applicable to the subject is to consider whether from the circumstances the consent of the owner to the use may fairly be presumed. It is said in the books that if the use would be for the benefit of the property, the assent of the owner should generally be presumed, but not so if the use would be injurious or perilous. It would seem that if the use would be indifferent, the right to use should be determined the way other circumstances incline. In some cases the assent of the owners may be inferred as a fact from the circumstances; but that is not in all cases necessary; for in some cases the presumed assent is a mere fiction, and the question as to the right of the bailee to use the property becomes a question of law upon a given state of facts without reference to any actual assent of the owner in fact. It is generally not only the right, but the duty, of the bailee to use the property so far as necessary to its preservation. To this extent the assent of the owner may be presumed—as in case of the milking of a milch cow; and in the case of a horse, exercise and moderate use to the extent necessary to the health and vigor of the animal. Again, it is laid down by the elementary writers that the right to use the

<sup>2</sup> 43 Vt. 30.

property may depend on whether it is property of a nature that requires expense to keep it; and if so, the bailee may use it reasonably to compensate him for the charge of keeping. This fact, however, would not necessarily determine the right without reference to the character of the bailment and other circumstances."

It may be said to be the general holding that "the right of a bailee to use the thing bailed is strictly confined to the use expressed or implied in the particular transaction; and in case of an unauthorized use, the bailee makes himself liable for any loss, although it be by inevitable casualty."<sup>3</sup>

§ 47. Bailee may protect the property and his interest.—As we have seen, the bailee only has a possessory title to the bailed property, and the right to its custody and use to the extent of the contract of bailment, but that title is paramount to any other claim except the title of the owner, and during the legal existence of the bailment, even the owner cannot disturb the bailee in his possession, custody, and use to the extent of the contract.

The bailee may bring replevin for the possession of the property, and in some instances trover for its value; as when it is destroyed or damaged to an extent that the benefits of possession are impaired; or where it would be necessary to protect it, the owner may sustain an action of trover for its value.<sup>4</sup>

<sup>3</sup> Lane v. Cameron, 38 Wis. 603; Devoin v. Lumber Co., 64 Wis. 616, 54 Am. Rep. 649; Clark v. Whitaker, 19 Conn. 319. Where a bailee accepted a horse to board with directions that he was not to use him in any way, the use of him under the bailment was a conversion. Collins v. Bennett, 46 N. Y. 490. For a general discussion of the cases, see notes to McCurdy v. Wollblom, etc., Co., 3 Am. & Eng. Annotated Cases, 468.

<sup>4</sup> In Harrington v. King, 121 Mass. 269, 271, the court say: "It is a leading principle that bare possession constitutes sufficient title to enable the party enjoying it to obtain a legal remedy against

a wrong doer; and accordingly it is held that a bailee without interest has a title arising simply upon his possession sufficient to maintain trover against one who wrongfully invades that possession." Shaw v. Kaler, 106 Mass. 448; Vermillion v. Parsons, 101 Mo. App. 602, 73 S. W. 994. In Chamberlain v. West, 37 Minn. 54, 33 N. W. 114, the court say: "Nothing is better settled than that in actions for tort in the taking or conversion of personal property against a stranger to the title, a bailee, mortgagee or other special property man, is entitled to recover full value, and must account to the general owner for the

§ 48. **Skilled bailee.**—Where the care, custody or services are undertaken by a gratuitous bailee who is skilled in the particular business involved, the same general rule of diligence applies. It will be seen, however, that even slight diligence in such a case might secure to the bailor the benefit of skilled professional service, because, although the bailee is to receive no compensation, the bailor is entitled to receive the kind of service, care and custody the bailee holds out to the public he is competent to perform. As, for example, where a watch is left with a skilled watchmaker for repairs, the repairs to be made without compensation, he is required to render such service as he claims and gives out he is able to render, and to do less than that would be gross negligence. The same rule is applied in the case of a skilled surgeon, who, without compensation, undertakes to perform a surgical operation. He must use all of the professional skill he ordinarily uses and gives out to the public, and to those who employ him, that he is in the habit of using. And it may be said that this same rule would apply in cases of special deposits in banks; although there is no compensation, and the bailment is gratuitous, the exercise of less skill and care in looking after the property than the bank would usually exercise in matters of its own would be considered gross negligence, and if loss or injury resulted from it the bank would be liable. Very many examples might be given, but sufficient have been noticed to illustrate the rule.

§ 49. **Rule not always carefully stated.**—It would appear that there is quite a tendency among a few of the judges to loosely state the degree of diligence required, especially in cases of the bailee in gratuitous bailments; and according to some of the cases it would seem that "ordinary diligence" is always required, or the same degree of diligence that is required in "mutual benefit" bailments, for they fail to make any distinction; but the better class of authority has always clung to the doctrine of degrees of diligence and negligence in fixing or excusing liability.

§ 50. **Special deposits in banks.**—In these cases two important questions are generally involved: 1st. The question as

surplus recovered beyond the value of his own interest; but as against the general owner or one in privity with him he can only

recover the value of his special property." *Atkins v. Moore*, 82 Ill. 240; *Jellett v. St. Paul, etc., R. R. Co.*, 30 Minn. 265.

to whether the servants of the bank (corporation) acted within the scope of their authority, and for the bank in accepting the property; and, 2d. The question of diligence or negligence that occasioned its loss.

As we have seen, a corporation may be a bailee of property; but as a corporation, from its very nature, must of necessity act by its officers and servants, the question at once presents itself: in doing the business, in accepting the trust, were they acting as corporate officers or individuals? Was their action within the corporate powers of the bank? For if the act done was not within the corporate authority, it would be held to be an individual act of the officers or servants, and the corporation would not be liable; and so if the officers or servants did not act nor pretend to act within the scope of their authority to the knowledge of the bailor the bank would not be liable. But even in that case if the property or deposit was received by the corporation with the knowledge and approval of its officers, the bailor delivering it in good faith, the corporation would be liable for its loss, if the loss was occasioned by gross negligence. The only way of escaping liability in such a case would be to return the property to the owner, or get rid of its possession in some other lawful way, or retaining it, to exercise the diligence required for its protection.<sup>5</sup>

If, however, the accepting of the trust was within the corporate authority, and the officers or servants were acting within the scope of their powers, then the second question, as to negligence or diligence resulting in loss, would determine the question of liability of the corporation.<sup>6</sup>

§ 51. — **Determining negligence.**—Very many questions arise in determining negligence on the part of the corporation. As in case of a bank that is the depository of a special deposit: Did the corporation furnish a suitable, fit place for the keeping of the property safe from fire or from robbers? If stolen by its own servants or officers in charge, did the bank have knowledge that they were dishonest? Did the bank use diligence in the employment of fit and proper servants?

<sup>5</sup> *National Bank v. Graham*, 100 U. S. 699, 701.

<sup>6</sup> *Foster v. Essex Bank*, 17 Mass. 478, a leading case where the bailee defendant was held liable

for gross negligence, the bailment being gratuitous. In *Cutting v. Morlen*, 78 N. Y. 454, 459, held if bailment for mutual benefit ordinary diligence required.

In a Massachusetts case, *Smith v. First National Bank*,<sup>7</sup> it was held, in a case of special deposit which was lost from the bank vaults, that in case of gratuitous bailment it must appear that the corporation was guilty of gross carelessness of which the loss was the result, and that this might appear from the fact that the corporation did not furnish a proper place for the custody of the property; or from failure to take proper precautions in guarding the place; or negligence in selecting suitable persons to attend to the care and custody; or in failing to discharge persons after having knowledge of their unfitness. In Pennsylvania the court held, in a case where bonds were deposited with the bank as a special deposit and were stolen by the teller, that "nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence without raising a contract for care higher than a gratuitous bailment can create."<sup>8</sup>

This discussion, however, belongs to another part of our subject, viz., the liability of gratuitous bailees.

§ 52. **Honesty and good faith demanded.**—Nothing short of honesty and good faith will excuse the bailee in case of loss or injury. Every bailment relation is a contract relation, either express or implied; a contract which imposes certain responsibilities upon the parties to the bailment, and this contract must be strictly and in good faith carried out by the parties. The bailor must in good faith and honestly do his duty in the matter of the bailment. The law will not permit him to do anything that will impair or encroach upon the legal rights of the bailee in the full possession and enjoyment of the property to the extent of the bailment contract; as, for example, by depriving the bailee of the possession, or by injuring the property, and thus making it less useful; and on the other hand, the bailee is held to strict, good faith and honesty in carrying out the contract relation. He cannot sell or pledge the property or otherwise deal with it in a way to injure the bailor; and while in possession as bailee he will not be allowed to set up a claim of ownership in himself; and should he become the owner of a title adverse to the title of the bailor, he must first return the possession of the property to the bailor before he

<sup>7</sup> 99 Mass. 605, 611.

<sup>8</sup> *Scott v. National Bank of Chester Valley*, 72 Pa. St. 471-479.

will be heard in the courts to assert his own claim of title; and should the bailee undertake to obtain the title adverse to the bailor, the bailor could at once recover the possession of the property, and the bailment contract would be considered at an end.\*

§ 53. **Bailee may protect himself against claim of third parties.**—While the bailee cannot hold the property adversely to the bailor to benefit himself, or obtain for himself title adverse to the bailor, he may, in case the property is claimed, and the possession demanded by a third party, protect himself from damage on account of the adverse claims of the bailor and the third party. (1) He may compel the parties claiming title to interplead, and thus obtain judgment of the court as to which of them is entitled to the property, or (2) at his peril he may recognize the claim of the third party and join with him to sustain his title to the property. This, however, he does at his risk; for if the bailor should sustain his title, he could by reason of the action of the bailee terminate the bailment.

§ 54. **What would excuse liability.**—If the property in possession of the bailee is lost, injured or destroyed by reason of the act of God, the public enemy, irresistible force or inevitable accident, or by fire or robbery without the negligence of the bailee, the bailee would not be liable; the degree of diligence that would be required, or of negligence that would render him liable, would depend upon the kind of bailment and will be discussed in another chapter. We here state the general rule in cases where it is understood that the bailee acted in good faith.

§ 55. **Unlawful tortious possession would render bailee liable for injury or loss.**—If the bailee has obtained possession of the property unlawfully or tortiously, then none of the conditions stated in the last paragraph would excuse him from liability; he would be liable absolutely. The usual example given is, if one unlawfully or tortiously obtains possession of my boat and loses it in a storm, no matter how careful he may have been in its management, no matter if the loss was occasioned by the act of God, because of the tortious unlawful possession, he will be liable at all events. And so the tortious departure

\* Osgood v. Nichols, 5 Gray Landes, 1 Duv. (Ky.), 299; and (Mass.), 420; Burley v. Hamilton, see cases cited 3 Am. & Eng. 15 Pick. (Mass.), 40; Sinclair v. Encyl. (2d ed.) 758, 759. Murphy, 14 Mich. 392; Barron v.



from the terms of the contract, by misappropriating the property or misusing it, renders the bailee liable.

§ 56. **Rights and duties as to third parties.**—(1) *Bailor liable to, for furnishing certain necessities.* As we have seen, a gratuitous bailee is entitled to be reimbursed for that which he has necessarily expended or incurred for the preservation of the property. It therefore follows that third persons who have furnished to such a bailee that which is necessary for the preservation of the property and for the carrying out of the bailment would be entitled to be reimbursed, and, upon failure of the bailor to do so, the party could sustain an action against him. The rule might be different in other classes of bailment and would depend somewhat upon the contract.

(2) *Bailor's action against, for injuries or for property.* The possession of the property, and often the use of it, is with the bailee; it therefore follows that the bailor could not sustain trespass or replevin; but should the loss or injury be permanent or so serious as to injure the value of the property, the bailor could sustain a special action for the same.<sup>10</sup>

§ 57. **Bailee against third parties.**—The bailee is entitled to the possession of the property. This is the very essence of his rights as a bailee; he therefore has a special right or property in the chattel to the extent of his bailment contract and can protect it against wrongdoers who occasion loss or injury. Therefore, if the chattel be lost by a common carrier<sup>11</sup> or innkeeper,<sup>12</sup> or is injured or converted by a trespasser,<sup>13</sup> the bailee may sustain an action for the property. In such cases the damages are not confined to the mere interest of the bailee, but in case of injury or loss of the property he may recover its full value, together with any special damage to him, and for all beyond his own interest he would be a trustee for the bailor or owner.<sup>14</sup>

§ 58. **Modifying or enlarging responsibility by contract.**—The bailee may by contract enlarge his liability to the extent of becoming an insurer of the property against the perils to

<sup>10</sup> *Lexington v. Kidd*, 7 Dana (Ky.), 245.

<sup>11</sup> *Moran v. Portland Steam Packet Co.*, 35 Me. 55; *Elkins v. Boston, etc. Ry. Co.*, 19 N. H. 337.

<sup>12</sup> *Chamberlain v. West*, 37 Minn. 54.

<sup>13</sup> *Peoria Ry. Co. v. McIntire*, 39

Ill. 298; *Little v. Fossett*, 34 Me. 545; *Faulkner v. Brown*, 13 Wend. 63; *Knight v. Davis Car Co.*, 71 Fed. 662. See cases cited in 3 Encyl. 761.

<sup>14</sup> *Littlefield v. Biddeford*, 29 Me. 310; *Woodman v. Nottingham*, 49 N. H. 387.

which it is understood by the parties it is to be exposed; and the contract may be express or implied, and the bailment or compensation to be received therefor is a sufficient consideration for such an undertaking.<sup>15</sup> It is not infrequently the case that the bailee by contract undertakes to return the property in as good condition as when taken by him, thus enlarging his liability.<sup>16</sup>

In *Reinstine v. Watts* it was held that the reception of merchandise by a bailee under an invoice distinctly stating that such merchandise is at the risk of the bailee against loss by fire, or otherwise, until returned, no other agreement appearing, conclusively implies a promise upon the part of the bailee to assume such risk.<sup>17</sup> And in *Drake v. White*<sup>18</sup> it was held that a creditor who stipulated with his debtor upon receiving personal property as security, that he would return the property or pay for it if the debt was paid, would be held to that contract, the court saying, "there can be no doubt that if a creditor sees fit to accept a deposit for security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so."

§ 59. **How far can the bailee lessen his responsibility by contract.**—Upon this there is perhaps not so great unanimity among the authorities; it is, however, settled that the contract must not go to the extent that it may be said to be in contravention of positive law, or against public policy, or it will be disregarded; and so it follows that a bailee cannot contract against his own fraud, nor that he will not be liable for gross negligence, for that is held to be equivalent to fraud. For, says Judge Story, "The law will not tolerate such an indecency and immorality as that a man shall contract to be safely dishonest. It therefore declares all such contracts utterly void, and holds the bailee liable in the same manner and to the same extent as if no such contract ever existed."<sup>19</sup>

§ 60. **Redelivery to bailor.**—With some few exceptions, which will be noted, it is the duty of the bailee, when the object of the bailment has been accomplished, to return the property to the bailor, or to the person designated by the contract of bail-

<sup>15</sup> *Strum v. Baker*, 150 U. S. 312.

<sup>18</sup> 117 Mass. 10.

<sup>16</sup> *Hunt v. Wyman*, 100 Mass. 198.

<sup>19</sup> *Story, Bailments*, sec. 32;

<sup>17</sup> 84 Me. 139; *Vigo Agri. Society v. Brumfiel*, 102 Ind. 146, 1

*Lancaster Co. Mut. I. Bank v. Smith*, 62 Pa. St. 47.

N. E. 382.

ment, together with all accessions to it during the term, and upon refusal to do so, unless he has some legal excuse for not redelivering the property, he will be guilty of conversion, and the bailor can recover the value of the property, or by an action of replevin the specific property.<sup>20</sup> As a general rule the bailor has a right to the redelivery of the specific property bailed and cannot be compelled to accept other property of the same kind of equal value and quantity in lieu of it. In *Atkins v. Gamble*<sup>21</sup> the court say: "The reason of the rule is obvious. The owner may have special reasons for desiring to retain that specific chattel; and there may be reasons why he attached a peculiar value to it beyond the value of other chattels of a precisely similar kind. If his desire in this respect be the result of mere caprice, he is entitled to be gratified in the exercise of it. . . . Hence the owner of such chattel cannot be compelled to accept in lieu of it another which appears to be precisely similar and of equal value. . . . But, we think, the reason of the rule ceases when applied to stocks. It is impossible that any sane person should have centered his affections upon a particular stock certificate, or that any violence could be done to his feelings by requiring him to accept another certificate of precisely similar character in lieu of it. His own certificate was only the evidence that he owned an undivided interest in the capital and business of the corporation. Another certificate of the same kind, for the same amount of stock, would entitle him to precisely the same rights as the former certificate. Each would be a precise equivalent of the other, and it is certain he could suffer no pecuniary loss by the transaction. . . . For these reasons, we think, a different rule should govern the conversion of a certificate of stock; and if the wrong-doer was at all times ready and willing to transfer to the owner an equivalent number of similar shares in the same company, by a proper and valid certificate, it would present a case for nominal damages only."

§ 61. Not always required to redeliver the specific property. It goes without saying that it is not always expected that the bailee will redeliver the specific thing bailed; as when wheat is taken to the miller to be ground into flour, or cloth to the

<sup>20</sup> *Ball v. Liney*, 48 N. Y. 9; *Dale v. See*, 51 N. J. L. 378; *Holbrook v. Wight*, 24 Wend. 169.

<sup>21</sup> 42 Cal. 86.

tailor to be made into clothing; from the very nature of the contract it is understood that the specific thing is not to be redelivered, but delivery in its changed form is expected. And so in case of property turned over to a factor, he is expected to dispose of the property, but the property or money received for it he is required to deliver to the bailor. And, as we have seen, where grain is delivered to a warehouseman, or an elevator, while the same identical grain is not to be returned, grain of like quality, quantity and value is expected to be returned, and the bailee is liable if he fails to do so;<sup>22</sup> and the courts have held that in case of wheat delivered to the miller to be manufactured into flour, it is not necessary to return flour made from the same identical wheat, but flour may be delivered made from any wheat in the mill of equal quality and kind.<sup>23</sup>

§ 62. **Excuses for non-delivery.**—*1st. When the property has been destroyed or lost without the fault of the bailee.* As we have seen, the bailee is excused from liability when the loss or destruction of the property is by the act of God, the public enemy, irresistible force, inevitable accident, or by fire or robbery, and without the fault or negligence of the bailee.<sup>24</sup>

*2d. The delivery of the property to the true owner.* If the true owner of the property should demand it of the bailee, he would be obliged to deliver it to such owner or subject himself to an action for its recovery, and if the property was delivered to the true owner it would be a complete defense to an action by the bailor for the property bailed; but the burden of proving that the person to whom he delivered the property was the true owner would be upon the bailee, and such a delivery would be at his risk.<sup>25</sup>

*3d. That he had been deprived of the property by due process of law* and therefore cannot redeliver the property to the bailor. But the bailee would not be protected by a process or seizure in a case where the bailor was not made a party;<sup>26</sup> and if he should permit the goods to be levied on or attached as his own, or as the property of a third party, he would not be exonerated,

<sup>22</sup> *Ashbey v. West*, 3 Ind. 170;  
*Foster v. Pettebone*, 7 N. Y. 433;  
*Stangher v. Green*, 10 Am. Dec. 488.

<sup>23</sup> *Inglebright v. Hammond*, 19 Ohio, 337.

<sup>24</sup> *Ante*, § 55.

<sup>25</sup> *Calhoun v. Thompson*, 56 Ala. 166; *Powell v. Robinson*, 76 Ala. 423.

<sup>26</sup> *Burton v. Wilkerson*, 18 Vt. 186.

for delivery under such a process would not afford him protection. In such case it would always be the duty of the bailee to protect the interests of his bailor.<sup>27</sup>

The bailee is not required to determine whether the judgment upon which the process is issued is correct, nor whether the statute upon which the proceedings were had is constitutional, but he must at his peril see to it that the process upon which the property is seized is a valid process; that upon its face it is regular, and that the court had jurisdiction to issue the writ or process.<sup>28</sup> And if the property upon a defective writ should be forcibly taken from him, he should at once institute proceedings to recover it.<sup>29</sup> This principle of the law is upon the theory that the person who takes the property from the bailee without valid process is a trespasser, and his tortious acts cannot be considered the act of the law, but the mere act of a trespasser, and against such acts the bailee is bound to protect the property.<sup>30</sup>

In *Roberts v. Stuyvesant*<sup>31</sup> the court say: "It is no doubt true that a bailee for reward, such as the defendant was, may excuse himself for a failure to deliver the property to the bailor when called for, by showing that the property was taken out of his custody under the authority of valid legal process, and that within a reasonable time he gave notice of that fact to the owner. . . . But in this case the persons who took the property had no process that authorized them to do so, and hence the defendant had the right to make such resistance to it as it would have had if the same parties attempted to take it without any process whatever, and, if overcome by superior

<sup>27</sup> *Bernard v. Knobbs*, 3 Daly (N. Y.), 35; *Rogers v. Weir*, 34 N. Y. 463; *Kelley v. Patchell*, 5 W. Va. 585.

<sup>28</sup> *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351.

<sup>29</sup> *Welles v. Thornton*, 45 Barb. (N. Y.), 390. When the property has been taken from him by legal process, he should at once notify the bailor. *Ohio, etc., R. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727. But if the bailor has knowledge of the fact formal notice by the bailee is not necessary. *Fur-*

*mun v. Chicago, etc. R. Co.*, 81 Iowa, 540, 46 N. W. 1049; *Robinson v. Memphis R. Co.*, 16 Fed. 57. Seizure of property exempt from execution on an attachment will not protect bailee. *Kiff v. Old Colony R. Co.*, 117 Mass. 591, 19 Am. Rep. 429.

<sup>30</sup> *Stephens v. Vaughn*, 20 Am. Dec. 216.

<sup>31</sup> 123 N. Y. 57-65, 25 N. E. 294, 20 Am. St. Rep. 718, 9 L. R. A. 438; *Edwards v. White Line, etc., Co.*, 104 Mass. 159, 6 Am. Rep. 213.

force, they could pursue and reclaim it by legal proceedings or otherwise in the same manner as if the search-warrant had not been procured. When property in the custody of a bailee for hire is demanded by third persons, under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse and to offer such resistance to the taking, and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would, if it had been demanded and taken under a claim of right to the property by another without legal process. The defendant did not discharge the duty that it owed to the bailor and owner of the property by merely making a formal protest against entering the vaults where the property was. A person who would allow his own property to be taken from him under like circumstances, and without doing more to prevent such a result, or to repossess himself of it when taken, could scarcely be called a prudent man. It follows that the defendant has not shown that the property was taken from its possession by legal process so as to excuse its loss. . . . While a bailee who permits the property of the bailor to be taken by a stranger, may excuse himself by showing that he yielded to the power of legal process, it does not follow that a seizure under such process, after the bailee has negligently allowed the property to pass into the hands of trespassers, or persons who have no right to it, will be any protection to him in an action by the owner. When the defendant permitted the property to be taken from its custody, without using proper diligence and care to retain or reclaim it, the plaintiff's cause of action accrued and could not be defeated by the action of parties seeking to establish claims against the owner. The rule in such cases seems to be that when a bailee is sued by the owner for the conversion or negligent loss of the property bailed, it is not a defense or bar to the action to show that after it went into the possession of others it was levied upon under process against the owner."

*4th. That the bailment property is claimed and demanded of him by other persons.* Of course such a claim or demand, if it is clearly and to the knowledge of the bailee without foundation and entirely groundless, would not excuse the bailee; but if there appears to be reason for the claim, and to resist it would subject the bailee to damages by way of litigation or

otherwise, in such case the bailee is under no obligation to take that risk and redeliver the property to the bailor; he may in such case require the contesting claimants to settle the question of who has the legal title by filing a bill for interpleader.

*5th. When excused by the terms of the contract.* When by the terms of the contract, either express or implied, the bailee is excused from redelivering to the bailor, but is to deliver to some other person. As, for example, to the agent of the bailor, or to a person designated and agreed upon by the parties.

**§ 63. Conversion of the property.**—If the bailee has no valid excuse for not doing so, it is his duty at the termination and accomplishment of the bailment, upon the demand of the bailor, to redeliver the property to him, and a refusal to do so would be a conversion of the subject of the bailment. If the bailee should sell the subject of the bailment, or do any unauthorized act with reference to it, be guilty of bad faith, or fraud, or violate the bailment contract, the bailor would have the right to terminate the relation and demand the return of the property, and if the bailee should fail to redeliver it he would be liable as for a conversion of the property, and the bailor would have the right to pursue the property and retake it, even from a *bona fide* purchaser, and upon demand and refusal could sustain replevin or trover against such purchaser, for the reason that the bailee had no title to the property and could, therefore, convey none, and the title of the bailor would not be impaired by the pretended sale.<sup>32</sup>

“The law is well settled that a bailee cannot make a valid sale of property which is the subject of the bailment, even to a *bona fide* purchaser who may buy in ignorance of the vendor’s want of title.”<sup>33</sup>

**§ 64. Bailee’s right to compensation and lien.**—The right of the bailee to compensation and a lien upon the property bailed, exists only when the bailment belongs to the mutual benefit class, or to that class which is a part of the mutual benefit bailments, called exceptional bailments. For it goes without saying that this right could not exist in gratuitous bailments.

The right of the bailee to compensation and the amount he is to receive is usually expressed in the contract of bailment, or

<sup>32</sup> Calhoun v. Thompson, 56 Ala. 166.

<sup>33</sup> Medlin v. Wilkinson, 81 Ala.

147; Lovejoy v. Jones, 30 N. H. 164; Johnson v. Miller, 16 Ohio,

431; Dunham v. Lee, 24 Vt. 432.

may be implied from the circumstances and the nature of the bailment. Generally, unless it is stipulated otherwise, or the contract be such that it can be clearly inferred from it and the circumstances that there was to be no compensation for the services rendered, the law will imply a promise to pay on the part of the bailor who has received the benefit of them the amount they are reasonably worth.<sup>24</sup>

Originally the common law limited the right to a lien for services bestowed, to persons who from the nature of their occupation were obliged, according to their means, to receive and be at trouble and expense about the property or bailment, as those who pursued avocations necessary for the accommodation of the public, as common carriers, innkeepers and the like. But, as has been said, in more modern times the right has been extended so far that it may be now laid down as a general rule to which there are few exceptions, that every bailee for hire who by his labor and skill has imparted an additional value to the goods of another has a lien upon the property, for his reasonable charges in relation to it and a right to retain it in his possession until those charges are paid.<sup>25</sup>

**§ 65. Agreement for compensation, express or implied, necessary to create lien.**—If there is no agreement or understanding that the bailee is to receive compensation, and no circumstances that would naturally imply such an understanding, there could be no lien. As, for example, “a person not engaged in the business of warehousing or storage who permits another to deposit a chattle in an unoccupied room of his premises does not thereby acquire any lien on such chattel for the value of the storage.”<sup>26</sup>

**§ 66. If no statute or express contract giving bailee lien—May have common-law lien.**—If the statutes do not create a lien

<sup>24</sup> *Henderson v. Mahoney*, 31 Tex. Civ. App. 539, 72 S. W. 1019.

<sup>25</sup> Every bailee for hire who by labor or skill has imparted additional value to the goods bailed has a lien thereon for his charges. *Morgan v. Conydon*, 4 N. Y. 552; *Burdick v. Murray*, 3 Vt. 302, 21 Am. Dec. 588; *Araíns v. Brickley*, 65 Wis. 26, 56 Am. Rep. 611; *Munson v. Porter*, 63 Iowa, 453; *Prible v. Kent*, 10 Ind. 325, 71 Am.

Dec. 327; *Wilson v. Martin*, 40 N. H. 88, 90; *Davidson v. Fankuchen*, 88 N. Y. S. 196. At common law an artisan had lien on chattels for work done. *Drummond & Co. v. Mills*, 54 Neb. 417, 74 N. W. 966, 40 L. R. A. 761; *McIntyre v. Carver*, 2 Watts & Sergt. 392, 37 Am. Dec. 519; *Hanna v. Phelps*, 7 Ind. 21, 63 Am. Dec. 410.

<sup>26</sup> *Alt v. Weidenberg*, 6 Bosw. (N. Y.) 176.



and there is no express contract giving to the bailee a lien upon the property, then the bailee will hold the property by virtue of the common-law lien if the facts are such as to create it. At common law a lien is a right arising by operation of law, whereby one may retain possession of another's property to secure the payment of a debt.

§ 67. **Two kinds of liens.**—Common-law liens are generally of two kinds: First, Particular or specific. Second, General.

(1) *A particular or specific lien* is one that attaches to a particular piece of personal property upon which, in carrying out the bailment contract, the bailee has performed services which have bettered the property. This lien attaches to specific articles in the possession of the bailee.

(2) *A general lien as applied to bailments*, is a right to retain the property of the bailor to secure a general balance due the bailee. It is the retaining of property, not only for services upon it, but for services and work upon other articles of the bailee. This lien is not favored in the law and will be strictly construed.<sup>37</sup> Nor does it attach except by express contract or agreement, by necessarily application, or usage.

This question is ably discussed in *Hensel v. Noble*,<sup>37a</sup> the court saying: "It cannot be doubted that a lien is given by the common law to a tradesman or artisan who in the course of his trade or occupation receives personal property upon which he bestows labor; and his right to a lien on the property is equally good whether there be an agreement for a stipulated price or only an implied contract to pay a reasonable compensation. It is equally clear, on principle as well as authority, that where there is an entire contract for making or repairing several articles for a gross sum, the tradesman has a lien on any one or more of the articles in his possession, not only for their proportionate part of the sum agreed upon for repairing the whole, but for such amount as he may be entitled to for labor bestowed upon all the articles embraced in the contract. . . . If the contract was entire, and the defendants in pursuance of it had not only repaired one wheel, but also had bestowed labor and incurred expense for the purpose of repairing the others, their lien on the one wheel in their possession was good for the whole amount of their labor and expense done and incurred

<sup>37</sup> *Taggart v. Buckmore*, 42 Me. 77.

<sup>37a</sup> 95 Pa. St. 345.

in pursuance of their contract, not exceeding the sum fixed by the agreement.”

§ 68. **Delivery to the bailee for the purpose of the bailment necessary to the establishment of the lien.**—The property must have been delivered by the owner or his duly authorized agent to the bailee for the purpose of the bailment, and if it come to the possession of the bailee in any other way he can have no lien. The possession obtained without the consent of the owner, or by the bailee taking the property without authority, would not support the lien, except in some cases of finding property. It is not necessary, however, that all of the property should be delivered at one time; if it came to him by different parcels and at different times it would be sufficient. Nor need there be an actual delivery. “The delivery may be symbolical or of a part for the whole. The delivery of a key, where the goods are locked up, is so far a delivery of the goods that it will support an action of trespass against a subsequent purchaser who gets possession of them.” A constructive possession is sufficient.

§ 69. **Possession of the property an essential.**—No lien can be created, except by express contract, upon property that has not been delivered, and which is not in the possession, actual or constructive, of the bailee. Possession is an essential to a common-law lien. It attaches only to property delivered for the purpose of the bailment, and upon which the bailee has, in carrying out the object of the bailment, performed labor.

§ 70. **The finder of property—His compensation—Lien.**—Property that is found, coming lawfully into the possession of the finder, creates the relation of bailor and bailee. The finder in such case is the bailee of the property and entitled to the possession of it against all the world except the true owner.<sup>28</sup> At common law the finder for the mere finding of the property is not entitled to compensation, but is entitled to be reimbursed for expenditures incident to finding the property, in possessing himself of it and in good faith expended in preserving and protecting it. The right to such compensation would seem to be based upon an implied request of the owner of lost property to

<sup>28</sup> *Lawrence v. Buck*, 62 Me. 275; *Tancil v. Seaton*, 28 Grat. (Va.), 601, 26 Am. Rep. 380, where it was held that a finder of bank notes could recover possession of

them from one to whom he had delivered them for safe keeping. *Hoagland v. Forest Park, etc. Co.*, 170 Mo. 335, 70 S. W. 878.

all persons to secure it, care for it and if necessary preserve it and restore it to him. Incident to and a part of this request is an implied undertaking to indemnify the finder who has in good faith made expenditures to reclaim the property and restore it to the owner.<sup>39</sup> This implied undertaking would support an action. The cases are few where the question has been decided but the weight of authority and the better reasoning would seem to hold that for the mere act of finding and returning the property to the owner there could be no recovery, but where it became necessary to make expenditures of time or money in protecting the property lost, the owner taking the property from the finder with knowledge of such reasonable and necessary expenditures would become liable for them upon his implied undertaking to pay them.<sup>40</sup>

If the property is not lost but abandoned or if lost and afterwards abandoned an action for such compensation would not lie and in such case the property might be appropriated by the finder having had notice of such an abandonment.

While the finder in certain cases as stated is entitled to compensation the law seems to be well settled that except by statute providing for it or in cases where a reward is offered he is not entitled to a lien upon the property to secure the payment of the amount. The law as stated in *Wood v. Pearson*<sup>41</sup> seems

<sup>39</sup> *Reader v. Anderson*, 4 Dana (Ky.), 193.

<sup>40</sup> This doctrine was recognized in *Chase v. Corcoran*, 106 Mass. 286, 288, where a boat was found within the ebb and flow of the tide water in a damaged condition. After stating it was not a claim for salvage for saving the boat adrift and in danger of tide water and not a claim for a lien, the court say, "His claim is for the reasonable expenses of keeping and repairing the boat after he had brought it to the shore; and the single question is, whether a promise is to be implied by law from the owner of a boat, upon taking it from a person who has found it adrift on tide water and

brought it ashore, to pay him for the necessary expenses of preserving the boat while in his possession. We are of the opinion that such a promise is to be implied. The plaintiff, as the finder of the boat, had the lawful possession of it and the right to do what was necessary for its preservation. Whatever might have been the liability of the owner if he had chosen to let the finder retain the boat, by taking it from him he made himself liable to pay the reasonable expenses incurred in keeping and repairing it."

<sup>41</sup> 45 Mich. 313, 317; *Preston v. Neale*, 12 Gray, 222; *Wentworth v. Day*, 3 Metc. (Mass.) 352; *Cummings v. Gunn*, 52 Pa. St. 484.

to be supported by authority. The court say: "According to the common law the finder of goods lost on land becomes proprietor in case the true owner does not appear. And meanwhile his right as finder is a perfect right against all others. But if the true owner does appear whatever right the finder may have against him for recompense, for the care and expense in the keeping and preserving of the property, his *status* as finder only, does not give him any lien on the property. Yet if such owner offers a reward to him who will return the property a lien thereon is thereby created to the extent of the reward offered."

When property is found *derelict*, as a ship in distress or that has been lost within the tide waters, that is, within the ebb and flow of the tide, whether in rivers navigable from the sea or from the seas, for any service rendered by persons other than the ship's crew for the purpose of saving the ship or its cargo and restoring it to the owner, the finder or persons rendering such services are entitled to compensation and may have a lien upon the property for the amount. Such persons are called salvors and their compensation is known as salvage.<sup>42</sup>

§ 71. **Extinction of the lien—Payment or tender.**—The basis of the bailee's lien is his claim for reasonable compensation; it therefore follows that payment of that amount by the bailor, or tender of the amount by the bailor to the bailee, would extinguish the lien; and if the bailee upon such payment or tender should still refuse to deliver the property, he would be liable in an action for conversion.<sup>43</sup>

§ 72. **The lien may be waived—**

(a) *By placing the refusal to deliver the property when demanded upon some other ground.* The claim which supports the bailee's lien, as we have seen, is his right to reasonable compensation; and he will not be allowed to retain the property for

Held in *Wilson v. Gaysun*, 8 Gill. (Md.), 213, that the reward must be certain and not simply the offer of a liberal reward.

<sup>42</sup> *Baker v. Hoag*, 7 N. Y. 555; Story on Bailm. sec. 622, *Baker v. Bates*, 23 Am. Dec. 678; *White-well v. Wells*, 24 Pick. (Mass.), 25; *Procter v. Adams*, 113 Mass. 376; *Forrester v. Huniata Bridge*

Co., 55 Am. Dec. 506, and editorial notes; *The Edith L. Allan*, 129 Fed. 888; *The Dredge No. 1*, 137 Fed. 110; *Deslondes v. Wilson*, 25 Am. Dec. 187.

<sup>43</sup> Rule at common law bailee can only hold the property until payment or tender of payment. *Burhfield v. Wheeler*, 14 Allen (Mass.), 139.

any other reason, not even for other debts due and owing to him from the bailor; and if he does not claim to retain the property as security for his reasonable compensation for care of it, or repairing it, or performing some work or improvements upon it which would entitle him to a lien, he waives his lien and renders himself liable to an action of replevin for the recovery of the specific property or of trover for its value, for he is guilty of conversion.<sup>44</sup>

In the case of *Hamilton v. McLaughlin* <sup>45</sup> the court says: "The only lien which the defendant claims is for keeping the horse after notice to the plaintiff and request to take it away. Whether the evidence was sufficient to prove that he had such a lien, and whether the instructions asked in regard to it were sound, we do not find it necessary to consider. It is immaterial that the defendant had a lien if he waived it at the time of the demand. A claim to hold the possession of the property, and a refusal to deliver it on demand under and in assertion of a right other than that given by the lien, would be evidence of a conversion." The principle of estoppel may also be invoked in such a case. The bailee, having placed his claim upon some other and different reason than his claim for compensation, would not be heard to make a different claim in an action against him to recover the possession or value of the property detained by him.

(b) *The bailee may also waive his lien by an agreement to give credit.* The lien of the bailee is further based upon the fact that the compensation is due and payable at the present time. If, therefore, the time of payment is extended by the giving of credit, the lien would be extinguished, as in that case the compensation would be an indebtedness against the bailor, payable at some future time and not dependent upon the lien, and so the courts hold that the giving of credit would be inconsistent with the holding of the property as security for the pay-

<sup>44</sup> When bailee asserts different ground for holding the property, waives lien. *Mexal v. Dearborn*, 12 Gray, Mass. 336; *Long Island, etc. Co. v. Fitzpatrick*, 18 Hun (N. Y.), 389; *Holderman v. Manier*, 104 Ind. 118. Not waived by fil-

ing claim for amount due in insolvent proceedings, if lien asserted when claim filed. *Kapp & Co. v. McCaffrey*, 178 Ill. 170, 52 N. E. 898, 69 Am. St. 290.

<sup>45</sup> 145 Mass. 20.

ment.<sup>46</sup> "The general principle is that an agreement to give credit or a special contract for a particular mode of payment inconsistent with the lien is a waiver of it. The operation of a lien is to place the property in pledge for the payment of the debt; and where the party agrees to give time for payment, or agrees to receive payment in a particular mode inconsistent with the existence of such a pledge, it is evidence, if nothing appears to the contrary, that he did not intend to rely upon the pledge of the goods in relation to which the debt arose to secure the payment."<sup>47</sup>

And the lien of the bailee will be considered as waived—

(c) *When he voluntarily parts with the possession of the property.* It has already been noticed that one of the requisites of the lien of the bailee is the possession of the goods upon which he asserts his lien. Possession being necessary, it follows that if the bailee should voluntarily part with it and allow the property to go beyond his control, his lien would be lost, and it would make no difference if the goods were delivered to a third party with an agreement that the lien was to continue, unless, perhaps, the goods were placed in the hands of a third party who was under the control of the bailee, and so a wrongful sale or pledge of the property would destroy the lien of the bailee. It has, however, been held that a lien acquired by a partnership will not be lost by a dissolution of the partnership, or by the assignment of the interest of one of the partners to the other. This does not so much depend upon the fact that the bailee has sold or pledged the property; the decisive matter is that he has parted with the possession. "The conduct of the bailee in parting with his possession is inconsistent with the preservation of his lien, and where that is proved, the presumption is that he has waived or abandoned it, unless his conduct in so doing is satisfactorily explained."<sup>48</sup> And there could be no explanation that would avoid the extinguishment of the lien if the rights of third parties had intervened.

<sup>46</sup> *McMaster v. Merrick*, 41 Mich. 505.

<sup>47</sup> *Tucker v. Taylor*, 53 Ind. 93; *Stoddard Mfg. Co. v. Huntley*, 8 N. H. 441.

<sup>48</sup> *Robinson v. Larrabel*, 63 Me. 116; *Morse v. Androscoggin R. Co.*, 39 Me. 285; *Stickney v. Allen*,

10 Gray (Mass), 352; *Kittaridge v. Freeman*, 48 Vt. 62. Retention of possession need not be by bailee personally, possession by another under his authority and control sufficient. *McFarland v. Wheeler*, 26 Wend. 467.

§ 73. **Lien once lost cannot be revived.**—The lien is supported and rests upon the fact of continued possession; that the property is retained in the hands of the bailee as security for his compensation. This possession once relinquished, the lien is necessarily at an end, and it could not be revived by repossessing himself of the property. The parting with the possession raises the presumption that he thereby waives or abandons his lien.<sup>49</sup> If, however, the bailor should obtain possession of the property by fraud or force, or by any wrongful recovery of the same, the bailee would not forfeit his lien, for the law would not permit the bailor to take advantage of his own wrong.

In *Bruley v. Ross et al.*,<sup>50</sup> it was held that where property had been pledged as security for a debt and the pledgor obtained possession thereof for a special purpose, with the consent of the pledgee, and thereupon took the property out of the county the pledgee could not be deemed to have released his lien therein, if the evidence showed that the pledgor obtained the possession of the thing pledged with a felonious design to deprive the pledgee of his security.

And in *Walcott v. Keith*<sup>51</sup> it was held that when possession, so essential not only to the creation but also to the continuance of the lien created, is obtained by the wrongful act of the pledgor and without the assent of the pledgee, it will not work a forfeiture of the lien, nor would it defeat the bailee's right of action to recover damages for an injury to or conversion of the pledge.

§ 74. **Right of the bailor to compensation.**—The right of the bailor to compensation may arise from express contract or by implication. If the circumstances were such that it would reasonably be presumed that the bailee was to pay the bailor compensation for the use of the property, a contract to make such payment would arise by implication; and it has been held that the fact that the bailment was made under the mutual expectation that the bailee would purchase the chattel did not raise a presumption that the use was gratuitously given.<sup>52</sup>

§ 75. **Enforcement of the lien of bailee.**—At common law the bailee cannot enforce or foreclose his lien by a sale of the property; he only has the right to hold it as security for his debt

<sup>49</sup> *Ibid.*

<sup>50</sup> 57 Iowa, 651.

<sup>51</sup> 22 N. H. 196.

<sup>52</sup> *Rider v. Union India Rubber Co.*, 28 N. J. 379.

against the bailor. This has, however, been regulated in most of the states by statute permitting a public sale of the property, after proper notice of the time and place, to satisfy the amount of the lien.<sup>22</sup>

A bailment lien is generally subject to a record lien, as for example, the lien of a bailee as a general rule is subject to a recorded mortgage or a mortgage on file in conformity with a statute making such filing notice to the public. But when the mortgage is given on the property while the labor is being performed, the bailee's lien will take priority, for the reason that he has not parted with the possession of the property, and his possession is notice to the world of his rights in it.

<sup>22</sup> In *Mill Creek Township v. Stock Yards*, 27 Ohio St. 435, it was held that if the property is perishable and liable to be entirely lost, and the owner is unknown, the bailee may sell it to

protect his lien. *Davidson v. Fankuchen*, 88 N. Y. S. 196; *Bissell v. Pierce*, 28 N. Y. 252; *Montreal Bank v. J. E. Potts, etc. Co.*, 91 Mich. 342, 51 N. W. 890.



## CHAPTER V.

### TERMINATION OF THE BAILMENT.

§ 76. The several ways.

77. By expiration of the time for which the property was bailed.

78. By reason of the accomplishment of the object.

79. By act of parties.

§ 80. By operation of law.

81. By destruction of the bailed property.

82. The death of the bailee.

83. By incompetency of the parties.

§ 76. **The several ways.** The several circumstances and conditions that will terminate the bailment relation have been more or less noticed in the previous pages; our intention now is to classify and briefly discuss them.

Bailments may be terminated in the following ways:

1st. By expiration of the time for which the property was bailed.

2d. By reason of the accomplishment of the object.

3d. By acts of the parties.

4th. By operation of law.

5th. By destruction of the property.

6th. If bailment is gratuitous, on death of bailee.

7th. By incompetency of the parties.

§ 77. **(1st) By expiration of the time for which the property was bailed.**—This needs no discussion. If the contract of bailment is limited as to time, it goes without saying that when that time expires the bailment will be at an end, there being no longer any agreement, express or implied, to support the bailment; provided, always, the parties act upon it by a redelivery of the property, or a sale, or a bailment of it.<sup>1</sup>

§ 78. **(2d) By reason of the accomplishment of the object.**—When the object of the bailment has been accomplished there is no longer any reason for continuing the relation, and either

<sup>1</sup> New York, etc. R. Co. v. New Coldw. (Tenn.), 539, 98 Am. Dec. Jersey, etc. Co., 6 N. J. Law, 338, 435. 38 Atl. 828; Cobb v. Wallace, 5

party can bring it to an end; the bailor by demanding the return of the bailed goods, or the bailee by tendering back the chattels in his possession as bailee. The contract would be executed and the relation of bailor and bailee could at once be ended. What we have said is, of course, presuming that the parties have no legal excuse for not redelivering the property. "It is obvious that a bailee, whatever the character of the bailment may be, when its purpose has been fully satisfied and performed, is bound, upon request, to redeliver the thing bailed to its lawful owner. This is necessarily implied in all cases from the nature of the contract of bailment. The authorities are uniform to the effect that such redelivery may be excused in the case of a bailment, mutually beneficial to both parties, by proof that the deposit has been lost or destroyed without negligence, or want of such care on the part of a bailee as prudent men under similar circumstances commonly take of their own goods. In case of gratuitous bailments, however, the bailee is liable only when chargeable with gross neglect. It necessarily follows from the nature of the obligation and the refusal to return the property, that the burden of showing the circumstances of the loss rests upon the bailee, and, unless the evidence shows the exercise of due care by him according to the nature of the bailment, he will be held responsible for the breach of his contract to return the property bailed."<sup>2</sup>

**§ 79. (3d) By act of parties.—**

(a) *On demand of bailor.* If the bailment is gratuitous, as a general rule the bailee has no right to the possession of the bailed property as against the bailor. In such case there is no consideration moving between the parties upon which a contract for use or possession can be implied for a greater time than the bailor may choose to allow the bailee to remain in the use or possession of the property. But while it is true that in such kind of bailments the bailor may revoke the bailment at his will, he cannot be unreasonable; as, for example, when the object of the bailment is but partially accomplished and to at once terminate it would be to impose upon the bailee an injury more or less serious, while to continue it for a reasonable time would be no damage to the bailor. As where one had borrowed an article for use, a *commodatum*, and in the midst of its use

<sup>2</sup> *Onderkirk v. C. N. Bank*, 119 v. *Schley*, 58 Ga. 369; *Morse v. Androscoggin R. Co.*, 39 Me. 285.

its return was demanded, and to comply with the demand would result in damage and great inconvenience to the bailee and no particular benefit to the bailor, refusal of compliance by the bailee would not terminate the bailment nor result in a conversion of the property.<sup>3</sup>

(b) *Bailor may terminate, when.* And when by the agreement creating the relation no time is fixed for the accomplishment of the bailment, the bailor may terminate by a demand of the property, and if the bailee does not return it within a reasonable time the bailment will be considered at an end. What under all the circumstances would be a reasonable time is a question for the jury.<sup>4</sup>

(c) *Where the bailee agrees to return the property in a fixed time and fails,* the bailor, for the purpose of terminating the relation, need not make any demand; the failure to so redeliver the property terminates the bailment, and the bailee will be considered as having converted the property.<sup>5</sup>

(d) *When by agreement the bailor is to return the bailed property at a particular place and fails.* If by the agreement the bailor is to return the subject of the bailment at a particular place, and makes a general refusal to redeliver the goods, the bailor may consider the bailment relation at an end, and is entitled to at once proceed to recover the property as though it had been converted by the bailee. And the fact that a demand for the property was made at a different place will make no difference.<sup>6</sup>

(e) *When declaration of ownership by bailee not enough.* It has been held, however, that a declaration made by the bailee to the bailor that he is the owner of the goods would not be sufficient upon which to found an action by the bailor for conversion, unless it were coupled with some action showing a determination to deny the bailor's title to the property; or some unequivocal act indicating that he is holding the property adverse to the bailor.<sup>7</sup>

(f) *By sale, pledge, or act of ownership by bailee.* If the

<sup>3</sup> Miller v. Dayton, 94 Minn. 340, 102 N. W. 862.

<sup>4</sup> Cobb v. Wallace, 5 Coldw. 539.

<sup>5</sup> Lay v. Lawson, 23 Ala. 377; Clapp v. Nelson, 12 Tex. 370.

<sup>6</sup> See note to Reizentein v. Marquardt, 1 L. R. A. 318.

<sup>7</sup> Green v. Harris, 3 N. C. 210; Knight v. Bell, 22 Ala. 198; Dunlap v. Gleason, 16 Mich. 158, 93 Am. Dec. 231; Johnson v. Whitmore, 27 Mich. 463; Thompson v. Moesta, 27 Mich. 182; Partridge v. Philbrick, 60 N. H. 556.

bailee should exercise any act of ownership adverse to the bailor, as by sale or pledge of the bailed property, the bailor can at once terminate the bailment and demand and recover the possession of his property.<sup>8</sup>

(g) *Abuse and injury of property.* It is incumbent upon the bailee to exercise good faith and deal fairly with the bailor; and so it follows that for a violation of this duty the bailor can terminate the bailment relation. It has been held, for example, that "one who hires a horse is liable in trover for wilful and immoderate fast driving by which the horse is injured."<sup>9</sup>

(h) *The bailee may terminate the bailment.* In case of gratuitous bailments for the sole benefit of the bailee (a *commodatum*), the bailee may terminate the bailment at any time by returning the bailed property to the bailor. And the depositary in a *depositum* bailment may, upon reasonable notice to the bailor, terminate the bailment by redelivering the deposit.<sup>10</sup>

(i) *If bailment for benefit of both parties.* In such kind of bailments there is a contract supported by a consideration, and, unless there has been some breach of the terms of the contract, the bailment cannot be terminated by the act of one of the parties; but bad faith or fraud, dishonest dealing, or failure to execute the trust, or for the causes already enumerated—as, for example, an assumed sale or pledge of the property bailed by the bailee, an unauthorized use of the property resulting in its injury, or any unwarranted action inconsistent with the contract of bailment—would furnish good cause for either party injured to terminate the bailment; but in such cases there should be notice given, by the party seeking to so terminate it, to the other party, and such notice should be reasonable.

§ 80. (4th) *By operation of law.*—As, for example, when the parties consent to the termination of the bailment, or when the bailee, by purchase or otherwise, becomes the owner of the subject of the bailment.

§ 81. (5th) *By destruction of the bailed property.*—When the subject of the bailment is destroyed there is no longer any-

<sup>8</sup> Story, *Bailments*, sec. 413; Sargent v. Gile, 8 N. H. 325; Bally v. Colby, 34 N. H. 29; King v. Bates, 57 N. H. 446; Swift v. Mosley, 10 Vt. 208; Dunham v. Lee, 24

Vt. 432; Crump v. Mitchell, 34 Miss. 449.

<sup>9</sup> Wentworth v. McDuffie, 48 N. H. 402.

<sup>10</sup> Roulston v. McClelland, 2 E. D. Smith (N. Y.), 60.

thing upon which the bailment can act, and it must of necessity be terminated. The liabilities of the parties, however, would be subject to the rules heretofore discussed.<sup>11</sup>

§ 82. (6th) **The death of the bailee.**—As a general rule, a bailment for the sole benefit of the bailor, would terminate at the death of either party if the bailment is entirely executory. And such a bailment when performance of it has been entered upon is one that is generally subject to the pleasure of either party, and may be terminated at any time, at least upon reasonable notice; for there is no binding obligation upon the parties that either could enforce against the will of the other to terminate it, nor would the death of either enlarge or limit the legal rights of the survivor or of the legal representatives of the deceased party.

If the bailment be for the sole benefit of the bailee, resting as such a relation does, upon conferring special favor or personal benefit; upon the death of the bailee, for whose benefit or favor the relation was created and existed, the bailment would terminate, for the object of it would cease, and the consideration supporting it is not such that it would sustain an enforced continuance against the will of the bailor to terminate the relation.<sup>12</sup>

If the bailment be one for the mutual benefit of the parties, which does not depend upon the personal or professional skill of the bailee, but which could be carried to completion by the personal representation of the deceased; as, for example, a bailment of material from which manufactured articles were to be produced, such a bailment would not terminate at the death of the bailee. Such a bailment contract would be an asset of the estate of the bailee, and a legal right of the bailor that could be enforced by an action for specific performance.

<sup>11</sup> New York, etc. R. Co. v. New Jersey, etc. R. Co., 60 N. J. L. 338, 38 Atl. 828.

<sup>12</sup> Farrow v. Bragg, 30 Ala. 361; Morris v. Lowe, 97 Tenn. 243, 46 S. W. 1098; Blount v. Hamey, 43 Mo. App. 644. In Smiley v. Allen, 13 Allen (Mass.), 465, where a coroner found the subject of the bailment on the dead body of the bailee and refused to deliver it to

the owner, the bailor, on demand, insisting that he should deliver it to the administrator of the estate, the court held that replevin for the property should be sustained, that the bailment was gratuitous and the owner might terminate it at any time, and that the death of the bailee did not alter his right in that regard.

The same or a similar doctrine exists and governs in case of personal contracts, upon the death of one of the parties. As was said by the court in a case where a heating apparatus was contracted for during the life time of decedent, but mostly set up after his death: "There can be no doubt that the estate of the deceased person is bound by his contracts in all respects, if they are carried out. If this work had not been done according to contract it would have raised a very different question, whether an implied contract could be raised on a *quantum meruit* which could bind the estate."<sup>13</sup>

In *Bambrick v. Webster Ass'n*<sup>14</sup> it was held that a building contract, not calling for services personal to the contractor, does not abate by his death, and his executor has the power to complete it, and realize the money for the estate to become due on its completion, and save the forfeiture of the bond of the deceased contractor. And in *Fulton v. Davidson Nat. Bank*<sup>15</sup> where stock was pledged by the deceased in his life time to secure a debt, it was held that the pledgee could retain possession of the pledge and enforce the payments of dividends so long as his claim is unsatisfied. The principal is the same as that governing in agency upon the death of the principal which as a general rule terminates the relation, except where the agent's authority is coupled with an interest, in which case he may continue until the object of the agency is completed.

And so if the relation is a mutual benefit bailment, not resting upon personal or professional skill of the bailee, which has been partially performed, there is a property interest in such a relation which upon the death of either party to the bailment, the survivor has the right to have protected, and the representatives of the deceased party may save to the estate.<sup>16</sup>

§ 83. (7th) By incompetency of the parties.—If either party should become incompetent to the extent that it would render him unfit to carry out the object of the bailment, the bailment

<sup>13</sup> *McKeown, Ex'r v. Harvey*, 40 Mich. 226, 227; *Marvel v. Phillips et al. Ex'rs*, 162 Mass. 399, 26 L. R. A. 416, was a mutual benefit bailment where the court held that the undertakings were chiefly personal in their character and

the death of the bailee terminated the relation.

<sup>14</sup> 53 Mo. App. 225.

<sup>15</sup> 26 Texas Civ. App. 115, 62 S. W. 84.

<sup>16</sup> *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.), 174; *McCartney v. Carbine*, 108 Ill. App. 282.

would terminate; as, for example, insanity of the bailee, or habitual drunkenness, if to the extent that it would affect the rights or duties of the parties. The determination of this question would of course depend largely upon the nature of the bailment and the condition of the parties. It would be a question of fact for the jury under proper instructions from the court. In case of a mandate, generally any change of the parties, as by marriage,<sup>17</sup> or appointment of a guardian,<sup>18</sup> and it has been held that bankruptcy of either party, would terminate the bailment.<sup>19</sup>

<sup>17</sup> Story, Agency, 488-500; Story, Bailment, sec. 206.

<sup>18</sup> Story, Bailment, 481.

<sup>19</sup> Parker v. Smith, 16 East, 382; Minet v. Forester, 4 Taunt. 541; Ex parte Newhall, 2 Story, 360.

## CHAPTER VI.

### LIABILITY OF THE BAILOR AND THE BAILEE WHEN THE BAILMENT IS FOR THE SOLE BENEFIT OF THE BAILOR.

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| <p>§ 84. These bailments of two kinds.</p> <p>85. <i>Mandatum</i>.</p> <p>86. <i>Depositum</i>.</p> <p>87. Use of the deposit.</p> <p>88. Special, not general deposit.</p> <p>89. <i>Quasi-deposits</i>.</p> <p>90. Subject limited.</p> <p>91. Distinction between <i>depositum</i> and <i>mandatum</i>.</p> <p>92. A contract relation.</p> <p>93. The bailee's liability.</p> <p>94. Authorities not entirely harmonious.</p> | <p>§ 95. For the sole benefit of the bailor.</p> <p>96. Even indirect benefit would change the class of bailment.</p> <p>97. Notice of facts requiring special care.</p> <p>98. Failure to obey instruction or the terms of the bailment.</p> <p>99. Termination of the relation and bailor's remedies.</p> |
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§ 84. These bailments of two kinds.—Bailments of this class are of two kinds: (1) *Mandatum* and (2) *Depositum*.

§ 85. (1) *Mandatum*.—A delivery of goods for the purpose of having some service, work or labor performed upon or about them by the bailee without recompense.<sup>1</sup> The bailor is called the mandator and the bailee the mandatary.

*Mandatum* was a word employed by Lord Holt in the celebrated case of *Coggs v. Bernard*.<sup>2</sup> Its applicability has, however, by some of the authors been questioned. It is said to be "a term apparently derived from the fiction of giving one's right hand as symbolical of delivery to another of authority to act;" it meant simply to constitute a gratuitous agency somewhat broader than we use in the law of bailments, if indeed it is applicable at all. An unpaid carrier was said to be a mandatary, and so was an unpaid oral messenger. It was not confined to personalty, nor was it necessarily occupied with the property at all; but in the sense we use it, it is the gratuitous doing of some act upon or about the subject of the bailment by the bailee. The bailment of a thing upon which the bailee

<sup>1</sup> Story's Bailments, sec. 137.

<sup>2</sup> 2 Ld. Raymond, 909.



is to do some work gratuitously, and return it to the bailor, or gratuitously to carry the thing from place to place, seems to cover the more modern idea of this kind of a bailment. Chancellor Kent defines it to be, "when one undertakes without recompense to do some act for the other in respect to the thing bailed."<sup>2</sup>

To create a mandate, three things are necessary. First, that there should exist something that should be the subject of the mandate, second, that it should be done gratuitously; and third, that the parties should voluntarily intend to enter into the contract. There is no particular form of entering into the contract. It may be verbal or in writing, or by implication,<sup>4</sup> and, as we have seen, the contract may be terminated in several ways.

§ 86. (2) *Depositum*.—Usually defined to be "a naked bailment of goods to be kept by the bailee for the bailor without reward, and returned when he shall require it."<sup>5</sup> Pothier defines it to be a "contract by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously, and obliges himself to return it when he shall be requested." The depositary of a special deposit is bound to return the specific article deposited, as is said, to return the thing *in individuo*, and in the same state in which it was received. And not only is he bound to return the individual thing deposited, but as well any increase or profits that may have accrued from it. As, for example, if an animal, any offspring that the animal may have born; if bonds, any interest that may have accumulated from it.<sup>6</sup>

§ 87. *Use of the deposit*.—And further, by way of bearing on the definition, it may be said that as a general rule the depositary has no right to use the thing deposited with him, qualified, however, by the rules already discussed; if the use of the thing is necessary to its preservation, it would be his duty to use it. As to this it has been said that "the best general rule on the subject is to consider whether there may or may not be an implied consent on the part of the owner to the use. If the use would be for the benefit of the deposit, the assent of the owner may well be presumed; if the use would be indiffer-

<sup>2</sup> 2 Kent's Com. 443.

<sup>4</sup> Story's Bailments, sec. 160.

<sup>5</sup> Jones, Bailments, 36, 117;

Story's Bailments, sec. 41.

<sup>6</sup> Story's Bailments, sec. 99.

ent, and other circumstances do not incline either way, the use may be deemed not allowable.<sup>7</sup>

§ 88. **Special, not general deposit.**—From what has been said it will be seen that the *depositum* refers to what is deemed and generally called a specific deposit, as the depositing of special money in a bank and not to the deposit of money or property that may be returned in like kind and of equal quantity and value; as a general deposit of money in a bank, which may be paid back in any other money of equal value.

§ 89. **Quasi-deposits.**—The so-called *quasi-deposit* may also be included here. As where one comes lawfully into the possession of the thing by finding. The contract relation is at once implied if he takes the thing into his possession. In a sense the finder is not a voluntary depositary, and yet he is if he takes possession and control of the found property, and he will be governed by the same rules of law as to liability.

§ 90. **Subject limited.**—It may be said, then, that in discussing the liability of the depositary in this class of bailments, we are limited to the possessor of special deposits where the specific property or thing is to be returned, and to that which has been called *quasi-deposit*.

§ 91. **Distinction between depositum and mandatum.**—The difference between a deposit and a mandate is apparent from what has been said. Both are gratuitous bailments, and so far as care and diligence are required, or liability for negligence created, both stand upon the same footing, as a general rule; yet in the latter, perhaps, the circumstances might involve a relatively different diligence, and render bailee liable for a relatively different negligence, because of the additional duties required. A deposit, as we have seen, is a naked gratuitous keeping of the thing—a gratuitous care and custody of the bailed property by the bailee for the sole benefit of the bailor, and a returning of the specific thing; while a mandate is more than this: it involves not only custody and care of the thing, but it involves, as well, labor and service upon or about the thing. Custody, as has been said in case of a mandate, “is merely accessorial.”

§ 92. **A contract relation.**—Whether *mandatum* or *depositum*, the relation is created by contract either express or implied. And so the parties must be governed entirely by the contract by

<sup>7</sup> Jones, Bailments, 80, 81; Story's Bailments, sec. 90.

which the relation is created, as to their care and custody, in performing the service as well as returning the property, and as to their liability in case of failure to carry out the contractual relation. And this applies as well to property that is found; for while it is true that the finder is created a bailee by operation of law in such case, the moment he takes the thing found into his possession, there is an implied contract that fixes his status and regulates his liability.

§ 93. **The bailee's liability.**—The bailment is for the sole benefit of the bailor, and so, following the general rule of liability generally conceded, the bailee is required to exercise slight diligence, and is liable only for gross negligence. It may be somewhat difficult in all cases to apply this rule, for the reason that it is often difficult to determine just what slight diligence or gross negligence is. No fixed rule can be applied: the circumstances of the particular case can only settle the question; but with a single exception, which will be hereinafter noted, it is a question of fact for the jury to determine.

It has been held that "a mandatary, or bailee who undertakes without reward to take care of the pledge, or perform any duty or labor, is required to use in its performance such care as men of common prudence, however inattentive, ordinarily take of their own affairs, and they will be liable only for bad faith, or gross negligence, which is an omission of that degree of care."<sup>8</sup> And in the supreme court of the United States in a comparatively recent case it was said: "Such bailees are bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of a similar character; and that the exercise of reasonable care is in all such cases the dictates of good faith; and that the care usually and generally deemed necessary in the community for the security of similar property under like conditions would be required of the bailee in such cases, but nothing more." Gross negligence, as applied to gratuitous bailees, is defined in the same case to be "nothing more than a failure to bestow the care which the property in its situation demands;" and the court say further: "The omission of the

<sup>8</sup> Kelly v. Kahn, 17 Ill. 170; 288, 58 Atl. 248; Smith v. Library King v. Exchange Bank, 106 Mo. Ass'n, 58 Minn. 108, 25 L. R. A. App. 1, 78 S. W. 1038; Smith v. 280. Elizabethport, etc. Co., 69 N. J. L.

reasonable care required is the negligence which creates the liability, and whether this existed is a question of fact for the jury to determine.”\*

§ 94. **Authorities not entirely harmonious.**—As to this liability, and, more properly speaking, the manner of arriving at it, the modern authorities do not seem to be entirely harmonious. There are those who would entirely ignore the degrees of diligence and negligence, and base the question of liability upon what they assert to be more philosophical, contending that the degree of care is fixed by the mutual understanding of the bailment purpose, and that any neglect of the fairly understood terms of the contract would render the bailee liable for any injury that resulted therefrom. It may, however, be said that the weight of authority is for the upholding of the standard of relative diligence, and the courts are continually relying upon these old rules and fixing liability by determining the degrees of diligence and negligence as laid down by the earlier writers.

§ 95. **For the sole benefit of the bailor.**—The bailment must be for the sole benefit of the bailor; the slightest benefit to the bailee would place the bailment in another class, and require a greater degree of diligence to be exercised on the part of the bailee. It is for this reason that the *depositum* or this class of bailments does not include the general deposit of money in a bank, and can only include the special deposit of the thing; because in the former the bank bailee, from the very nature of the bailment, has the right to use the deposited money in its business and thus derive some benefit, and so it would not be for the sole benefit of the bailor.

§ 96. **Even indirect benefit would change the class of bailment.**—No matter how slight the benefit, or how indirectly it comes to the bailee, if there is any benefit whatever it would place the bailment in another class of bailments, *viz.*, in that class where the benefit is mutual, and thus change the liability of the bailee. So slight is the consideration that will change

\* Preston v. Prathers, 137 U. S. 604; Gray v. Merriam, 148 Ill. 179; Carpenter v. Branch, 13 Vt. 161, 37 Am. Dec. 587; Francis v. Shrader, 67 Ill. 272; Chamberlain v. Cobb, 32 Iowa, 161; Prince v. Ala.

State Fair, 106 Ala. 340, 28 L. R. A. 716; Moeran v. N. Y. Poultry Ass'n, 59 N. Y. S. —; Smith v. Library, etc., 58 Minn. 108, 25 L. R. A. 280.

the bailment from this class to a mutual-benefit bailment, that it has been held that the mere acceding to a request on the part of the bailee to perform the trust, would raise the standard of liability and render the bailee liable for ordinary negligence, and require of him ordinary diligence, upon the presumption that his request, acceded to, is a benefit to him. In the case of *Vigo Agricultural Society v. Brumfiel*,<sup>10</sup> where the plaintiff, in compliance with an invitation, sent his gun to an agricultural fair for exhibition, the court held it a bailment for the benefit of both parties, requiring ordinary care. The court say:

“The case made by the complaint is one of bailment. The bailment was not a gratuitous one, for the reason that the exhibition of the gun, in response to the invitation contained in the advertisement of the appellant, constituted a consideration for the undertaking. It may be true that both parties derived a benefit, but this did not strip the contract of its character, that of a bailment for reward. The reward was not, it is true, in money, but it was nevertheless a reward in the form of an act performed at the request of the bailee. An association which invites persons to supply articles to enable it to conduct an exhibition receives some consideration from the person who responds to its invitation by placing articles in its care for exhibition.

Where a consideration of an indeterminate value is agreed upon by the parties, the courts will not undertake to determine its adequacy, but will respect the judgment of the parties and enforce their contract.”

§ 97. **Notice of facts requiring special care.**—While it is true that the bailee in this class of bailments is only held to slight diligence and answerable for gross negligence, we must always keep in mind that slight diligence is more or less modified or enlarged by particular circumstances, as shown in our discussion of definitions of diligence and negligence. So where the bailee has had notice of facts with reference to the bailment that require special care, he will not be permitted to exercise so gross a degree of negligence as to give such facts no attention whatever; but he is bound to exercise such a degree of diligence as persons in the like situation exercise over matters of their own under like circumstances. In *Joslyn v. King*,<sup>11</sup> a let-

<sup>10</sup> 102 Ind. 146, 1 N. E. 382.

<sup>11</sup> 27 Neb. 38.

ter carrier delivered a registered letter to the clerk of a hotel for one of the guests, the letter containing one hundred dollars. The carrier required of the clerk the usual receipt, which he signed, received the letter, and put it in the letter-box of the hotel, from which place it was stolen. It was held, in an action against the proprietor and clerk for the amount contained in the letter, that the receipt signed by the clerk was sufficient to charge him with notice that the letter was of more than ordinary importance, and required special care, and that the letter carrier, having paid the amount contained in the letter to the person to whom it was addressed, could enforce a liability against the clerk.

§ 98. **Failure to obey instructions or the terms of the bailment.**—And again, the fact that the bailee is only held to slight diligence will not excuse him from obeying instructions or from following the terms of the bailment and carrying out the object of the bailment contract. The diligence to which he is held is diligence in obeying instructions, as well as the manner of doing the thing he is instructed to do. In *Colyar v. Taylor*<sup>12</sup> the supreme court of Tennessee held one liable who had gratuitously undertaken to carry the money of the bailor to a certain place and deliver it to another; after receiving the money the bailee gave it to a neighbor, who undertook to carry it and deliver it for him, as requested by the bailor; while on his way home, in a crowd, the neighbor had his pocket picked of the money. The court held that the bailee violated his trust in handing the money to the neighbor, and was guilty of gross negligence. The terms of the bailment were violated.

§ 99. **Termination of the relation and bailor's remedies.**—These have already been discussed in another chapter, and it is not necessary to here treat the subject again.<sup>13</sup>

<sup>12</sup> 41 Tenn. 372; *Cannon River Mfg. Co. v. First Nat. Bank*, 37 Minn. 394.

<sup>13</sup> See *ante*, ch. V, §§ 77, 78, etc.

## CHAPTER VII.

### LIABILITY OF BAILOR WHEN BAILMENT IS FOR THE SOLE BENEFIT OF THE BAILEE.

#### § 100. *Commodatum*.

101. For the sole benefit of the bailee.
102. The liability of the bailee.
103. The contract must be for legal purpose.
104. Need not be absolute owner to be bailor or lender.
105. What right does the contract of loan or bailment confer?

#### § 106. Obligations of the borrower.

107. Bailee's defenses.
108. The injury or loss must have been without his fault.
109. Ordinary and extraordinary expenses to be paid.
110. Redelivery of the thing bailed.
111. Borrower cannot retain for debt due him.

§ 100. *Commodatum*.—A bailment for the sole benefit of the bailee is called *commodatum*.

*Definitions*.—Sir William Jones defines this class of bailment thus: "Lending for use is a bailment of a thing for a certain time to be used by the borrower without paying for it."<sup>1</sup> In the civil law it is defined to be "the granting of a thing to be used by the grantee gratuitously for a limited time, and then to be specifically returned."

Auliffe says: "It is a grant of a thing made in a gratuitous manner for a certain use, and for a certain term of time expressed or implied, to the end that the same specie should be again returned or restored again to us, and not another specie of the same kind or nature; and this in as good a plight as when it was first delivered."

Lord Holt has defined this class of bailment to be "when goods or chattels that are useful are lent to a friend *gratis* to be used by him; and it is called a *commodatum* because the thing to be returned in specie." So, it will be observed from these definitions, that a *commodatum* is the lending of the bailed property to the bailee for his use and accommodation and sole benefit, *gratis*, the specific thing loaned to be returned in as good condition as when borrowed.

<sup>1</sup> Jones on Bailments, 118, 217.

§ 101. **For the sole benefit of the bailee.**—The bailment must be for the sole benefit of the bailee, and there cannot be any benefit whatever, either directly or indirectly, to the bailor, for if there is, it at once becomes what is known as a mutual bailment, in which the duties and liabilities of the parties are very different.

§ 102. **The liability of the bailee.**—The bailee in this class of bailments is held to high diligence and liable for slight negligence. The care to be bestowed upon the property by the bailee is extraordinary care, and, as has been said, the bailee is liable “not only for a slight fault, but for the slightest fault,” And again, “he must bring to the thing loaned all possible care.”

In discussing this extraordinary care and diligence which is required by the bailee, Judge Story says: “As the loan is gratuitous, and exclusively for the benefit of the borrower, he is, upon the common principles of bailments already stated, bound to extraordinary diligence; and, of course, he is responsible for slight neglect in relation to the thing loaned.”

Sir William Jones is of opinion “that the borrower’s incapacity to exert more than ordinary diligence will not, even upon the grounds of an impossibility, furnish a sufficient excuse for slight neglect”; for he contends that the borrower ought to have considered his capacity before he deluded his friend by engaging in the act of borrowing. And this also is the doctrine of Pothier. But his doctrine must be received with some qualification and reserve, and be confined to cases where there is either an implied engagement for extraordinary diligence, or the lender has no reason to suspect or presume a want of capacity; for, if the lender is aware of the incapacity of the borrower, he has no right to insist upon such rigorous diligence. He has a right to insist on that degree of diligence only which belongs to the age, character, and the known habits of the borrower. Thus, if a spirited horse is loaned to a raw or rash youth, or to a weak and inefficient person who is known to be such, the lender must content himself with such diligence as they may fairly be expected to use; and he has no right to insist upon the diligence or prudence of a very thoughtful and experienced rider.”<sup>2</sup> The parties must here, as in contracts, be of legal capacity to enter into the contract relation, and, although not competent to make a contract, may be held liable for destruc-

<sup>2</sup> Story on Bailments, sec. 237.



tion or injury to the property; but it is put upon other grounds than that of contract relations, to wit, upon the ground that a tort has been committed. As, for example, where an infant borrows a horse to go to a certain place, and rides or drives the animal beyond that place and he is injured or killed, the action against the infant is an action of tort, and not an action upon the contract.

§ 103. **The contract must be for legal purpose.**—The contract may be expressed or implied. It may be oral or written, but in its nature it must be a legal contract, and not an immoral contract, or a contract against the law. But if it should be either immoral or for the accomplishment of some end which the law does not countenance, or which the law forbids, the contract would be void. And so if the property should be borrowed by the bailee, and loaned by the lender to him for an immoral or illegal purpose, the law would not recognize the contract, even to the extent of permitting the lender to recover the property, if the bailee should refuse to redeliver it to him, but the parties would be left where they had placed themselves, and the law would afford no further remedy.

§ 104. **Need not be absolute owner to be bailor or lender.**—It is not requisite to the contract of bailment that the bailor or lender should be the absolute owner of the bailed property; he may have a qualified or special property therein which gives him the control of the possession and custody of the thing. Having such a special property or control, he can become a bailor or lender, and his contract of bailment will only be limited by the extent of his property interest in the thing bailed. It is said that a thief in possession of stolen property may be a bailor as long as his possession has not been interfered with by the owner or by the authorities having the right to take the property from him; and so, as we have seen, the finder of property, who is entitled to the possession of it against all the world except the owner, may legally bail the property to the bailee, and the bailment could only be limited either by the bailor or the real owner of the property.

§ 105. **What right does the contract of loan or bailment confer?**—Because of the small if not doubtful consideration moving from the bailee in support of this class of bailments, so slight that it has been contended that there is no consideration, the bailment being for the sole benefit of the bailee, more or less discussion

has arisen as to the legal status of the parties. It is however settled that the *commodatum* bailee, having the property as a mere accommodation to him, has a possessory right in it which, like other bailees, he can legally defend against third persons; that, as to the use of the property this bailee may during the existence of the relation use it, if his use conforms strictly to the contract express or implied which created the relation, but this use must be confined to the limits of the contract or understanding of the parties, and use of the property bailed in a different way or to a greater extent would render him liable for any loss or injury resulting therefrom. So sensitive is the law touching the rights of the parties in this respect, that the causes which generally excuse a bailee acting within the scope of the contract of bailment, as for example, the act of God or the public enemy or irresistible force, would not be an available defense, and while in a strict sense this is the law governing every bailee whose acts without the sanction or domain of his contract results in loss or injury, in the case of the *commodatum* bailee the rule is given a more strict construction and the rights of the bailee are within much narrower limits.

§ 106. **Obligations of the borrower.**—Under the contract of bailment the borrower is bound to take good care of the property; to use it in accordance with the intention of the parties to the bailment, expressed or implied by the contract creating the relation, and to exert and exercise in the carrying out of the bailment high diligence; and for any loss resulting, even from his slight neglect, the borrower would be liable. This liability may be limited by contract, but the liability of the bailee in this class of bailment, as in others before discussed, cannot be limited to the extent of allowing the bailee to commit fraud, or so as to excuse gross negligence.

§ 107. **Bailee's defenses.**—The bailee or borrower, in case of *commodatum*, like other bailees, is excused for injury or loss to the property where the injury or loss is occasioned by the act of God, the public enemy, irresistible force, or inevitable accident. But, while he is thus excused, he cannot invoke these excuses unless he, himself, can show that the loss could not have been prevented or guarded against by the exercise of a high degree of diligence upon his part.

§ 108. **The injury or loss must have been without his fault.**—If the borrower or bailee should in any way fail to exercise this

high degree of diligence in avoiding the loss, or if he should be found guilty of the slightest negligence with reference to it, and by reason of this slight negligence, or failure to exercise this extraordinary diligence, the loss or injury was occasioned, in such case he could not be excused. As, for example, it has been held that where one in possession of the borrowed property leaves the highway and goes by a way which is frequented by robbers, and is robbed of the property, although by overpowering force, he would be held liable. So, any undue exposure of the property which would not be made by a very prudent man would render the bailee liable. It is, however, a rule of law that the neglect in order to render a bailee liable for injury or loss of the property must be a neglect of duty which the bailee was bound to have performed, or some omission to exercise diligence which he was in duty bound to exercise; and this required duty or diligence must be a duty or diligence which is imposed by the contract which creates the bailment.<sup>3</sup>

**§ 109. Ordinary and extraordinary expenses to be paid.**—The implication is, from every contract of this nature, that the bailee will put the property to its natural and ordinary use, and if in so using it he is put to expense, he himself will be required to pay the expenses. As, for example, if the property be a horse placed in possession of the bailee for use, its natural and ordinary use would require that the horse should be fed, stabled and cared for; that he would require shoeing. These would be ordinary and usual expenses in the use of the animal, and the borrower would be liable on account of them. But if, on the other hand, there should be extraordinary expenses,—expenses that are not occasioned or necessary by reason of the natural or ordinary use of the property, for such extraordinary expense the bailor would be liable, and not the bailee or bor-

<sup>3</sup> When the bailment or loan is gratuitous the bailee is held to extraordinary care and is liable for injuries arising from the slightest neglect on his part; but not for injuries or loss accruing wholly without his fault. *Bennett v. O'Brien*, 37 Ill. 250; *Phillips v. Couson*, 14 Ill. 84; *Wood v. McClure*, 7 Ind. 155; *Watkins v.*

*Roberts*, 28 Ind. 167; *Scranton v. Baxter*, 4 Sanford, N. Y. 5; *Beller v. Schultz*, 44 Mich. 529, 38 Am. Rep. 280. A disregard of instructions of the bailor by the bailee as to the use of the property bailed will render the bailee absolutely liable for any loss or injury arising from such disregard. *Cullen v. Lord*, 39 Iowa, 302.

rower of the property. As in the example just used, while the borrower would be liable for the expenses that are occasioned by the ordinary use of the horse, if the horse should be taken violently sick, and it should become necessary to employ a veterinary, and thus large and unusual expenses were incurred, the bailor would be liable for this expense; and if the borrower or the bailee in the first instance pay them, he could recover from the bailor the amount of such expenditures.<sup>4</sup> But should it appear that the extraordinary expenses were the result of the negligence of the bailee or because of his misconduct or misuse of the property he would not be entitled to reimbursement.<sup>5</sup>

§ 110. **Redelivery of the thing bailed.**—At the termination of the bailment contract it is the duty of the bailee to return to the bailor or lender the identical property that was loaned to him, together with all natural accessions to the property; as, for example, an animal's offspring, born during the bailment relation, if bonds or securities the interest that had been collected; and this redelivery must be made at the place and at the time mentioned in the contract, or implied by the agreement, or in accordance with the intention of the parties at the time the bailment relation was entered into; and the property should be delivered to the bailor, even though he is not the owner of the property; and a delivery to an agent of the bailor, unless he was especially authorized by the bailor to receive the property, would not be sufficient.

§ 111. **Borrower cannot retain for debt due him.**—This bailment relation contemplates the redelivery to the bailor of all the property which was loaned, and the borrower would have no right to retain it, or any portion of it, as security for a debt due and owing to him from the bailor. In this class of bailments no lien is created by implication, and if there is no intention of the parties to create a lien expressed in the bailment contract the law will not create one.

<sup>4</sup> *Starrett v. Barber*, 20 Me. 457; *Blake v. Buchanan*, 22 Vt. 548; *Chase v. Corcoran*, 106 Mass. 286; *Preston v. Neal*, 12 Gray (Mass.), 222; *Bacon v. New York*, etc. Bank, 9 N. Y. S. 435; *Dale v. Brinkerhoff*, 7 Daly, N. Y. 45. And this applies as well to mutual benefit bailments as to gratuitous bailment.

<sup>5</sup> *Enos v. Cole*, 53 Wis. 235, 10 N. W. 377; *Flick v. Runnels*, 48 Mich. 302, 12 N. W. 204.

## CHAPTER VIII.

### LIABILITY OF BAILOR AND BAILEE WHEN BAILMENT FOR BENEFIT OF BOTH.

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| <p>§ 112. Of the nature and extent of mutual-benefit bailments.</p> <p>113. <i>Locatio et conductio</i> bailments.</p> <p>114. Some definitions further explaining.</p> | <p>§ 115. A general view—<i>Locatio et conductio</i>.</p> <p>116. — <i>Locatio conductio</i> bailments.</p> <p>117. What the hiring bailments embrace.</p> <p>118. General subdivisions of the hiring bailments.</p> |
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#### § 112. Of the nature and extent of mutual-benefit bailments.

—In this class of bailments mutual benefit is the leading feature of the contract, and by it is fixed the liability of the parties. The consideration supporting the contract is valuable to both, and the property interest in the bailment is distinct.

This is by far the most important class of bailments and will necessarily include in its discussion a great variety of business relations. Belonging to this class are pledge and pawn, innkeepers, and the so-called exceptional bailments—postmasters and common carriers; all of the bailments known and commonly denominated as the “*locatio*” bailments with their subdivisions; “*locatio rei*,” which includes the hiring of property for use, and of itself embraces a large amount of business; “*locatio operis faciendi*,” embracing all of that volume of contracts arising from the hiring of work and labor to be performed on the bailed property in the hands of the bailee who performs the labor; “*locatio custodiarum*,” all that class of business relations pertaining to the care and custody of goods, as warehousemen, elevator-men, and the like, and those exceptional bailments which, because of the peculiar and important relations they create, coming so near to the personal interests of mankind, and often involving their safety, and which for this reason are especially governed and controlled by public policy; these include innkeepers, or, as they are more modernly called, hotel-keepers, postmasters who have charge of the great volume of mail of the country, and last and most important, that class

denominated in the Roman subdivision as "*locatio operis mercium vehendarum*," or the hiring of the transporting of goods which embrace the immense carrying trade of freight and passengers by the carriers of the world.

To mention these great business interests is to impress one with the importance of the subject in hand. To determine something of the manner of the carrying on of these vast interests, and to treat of the liability of the parties engaged in the prosecution of it, is the work before us.

§ 113. *Locatio et conductio* bailments.—The hiring bailments, so called, are denominated "*locatio*" bailments, which term is used as well in referring to the "hiring" bailments as the "letting" bailments, the hiring of the use of the thing bailed as the letting of the thing to be used. The *conductio* bailments, that is to say *locatio*, which means letting, is used indiscriminately with *conductio*, which means hiring. All these, whether hiring or letting, in our law are termed "*locatio*" bailments. That is to say, this class of bailments is broader and includes more than the mere *locatio* (letting) bailments. They embrace, as well, the *conductio* (hiring) bailments; and so, in discussing this subject, we shall treat *locatio* bailments as including the *conductio* bailments.

§ 114. *Some definitions further explaining.*—With what has just been said as to this class of bailments, we call attention to some of the definitions of writers on this subject. Pothier defines this class of bailments to be: "A contract by which one of the contracting parties engages to allow the other to enjoy or use the thing hired during the stipulated period, for a compensation which the other party engages to pay." Lord Holt in *Coggs v. Bernard* defines it: "When goods are left with the bailee to be used by him for hire." These definitions only contemplate the hiring of the thing, and the letting of the thing for hire, and exclude that other feature of bailments of this class—the hiring of labor and service upon and about the thing. Bell defines with, perhaps, more exactness: "*Locatio* is in general defined to be a contract by which the temporary use of the subject, or the work or service of a person, is given for an ascertained hire." And Judge Story defines it in still more comprehensive language, saying: "At common law it may properly enough be defined to be a bailment of a personal chattel, whose compensation is to be given for the use of the thing, or for labor

or for services about it; or, in other words, it is a loan for hire, or a hiring or letting of goods, or of labor or services for a reward."<sup>1</sup>

§ 115. **A general view—Locatio et conductio.**—Keeping in view what has been said by way of introduction of this division of our subject, we are at once introduced into a broad and extensive field of bailment law, compassing and bringing within its limits varied and almost innumerable branches of business. For, turn where we will in the ordinary pursuits of business life, we meet in one form or another this great and important subject. The millionaire and capitalist, the professional man, the mechanic and artisan, even the laboring man, all of every class and pursuit are met by the great enterprises embraced in this class and by the rules of law governing the *locatio* bailments.

The millionaire or capitalist who deals in stocks, bonds and loans and intrusts large personal securities to others for speculation and investment, who projects great internal improvement as the building and operating of railroads, and sends the steamships to plow the ocean and inland lakes; the great corporations who engage in the business of banking and brokerage; the trust companies who look after securities, certificates of stock and coupons, and keep within their safe-deposits the money, titledeeds and securities of others; the warehousemen who, within the walls of our great warehouses, store the immense accumulation of personal property left with them for safe storage; the wharfingers who hold for shipments by the great ocean liners and steamships of the great lakes and rivers the immense consignments of freight; the manufacturers, mechanics and artisans who manufacture the hundreds of thousands of articles for the daily use and consumption of mankind; the farmer who feeds and shelters our animals for hire; the liveryman who, for a reward, furnishes for others horses and carriages for their transportation in and about the carrying on of their business and for pleasure; the jeweler who manufac-

<sup>1</sup> In *Sulpho, etc. Co. v. Allen*, 66 Neb. 295, 1 Am. & Eng. Ann. Cases, 21, it was held that "a bailment is for hire, although no direct hire is paid for the bailment, when it is a necessary incident of

a business in which the bailee makes a profit." In the notes in 1 Am. & Eng. Annotated Cases, 23, is collected cases bearing on the subject.

tures for hire and reward the jewels for our adornment, and repairs our watches; the tailor who manufactures our cloth into suits of clothing for our wearing apparel; the miller who grinds our corn and wheat and other grains into flour for our bread and feed for our animals,—all these and more are dependent upon the law governing this class of bailments for their protection and defense and the settlement of their property interests, this *locatio conductio*, this letting and hiring of things, and labor and service about the things bailed; to discuss such a subject in all its details would consume more space than we can give it in a volume like this, and require a research into the texts of authors and adjudications of courts that would be almost endless. At most we can only hope to classify and treat of governing principles that in their application embrace the general subdivision of the subject.

§ 116. — *Locatio conductio bailments*.—These are commonly called the hiring bailments. They are created: (1) by contract expressed or implied; the contract may be oral or in writing, and is supported by the mutual consideration or benefit to both of the parties; (2) by operation of law, as in case of possession of property obtained by officers of courts, prize agents and salvors; this possession is commonly known as *quasi-bailments*.

§ 117. *The hiring bailments embrace* (1) the letting of the thing for hire; (2) the hiring of the thing for a reward; (3) work and labor and service upon and about the thing for compensation. It must be continually borne in mind that the subject of the bailment is always personalty, and, as we have seen, it may be corporeal or incorporeal; that is to say, it may be tangible personal property, as horses, carriages, manufactured articles, ships, railroad cars, and the like; or incorporeal, as stocks, bonds, notes, evidences of value, and the like, but not realty. The law of bailments operates purely and solely *in rem*—it is the letting of the thing which is the subject-matter of the bailment for hire; as, for example, the letting of the horse and carriage by the liveryman, the bailor, to be used and enjoyed by the bailee who takes it temporarily into his possession, for which the bailee pays to the bailor a recompense; the performing of some service or the hiring of some service or labor to be performed upon the thing, the subject of the bailment, by the bailee who has the property in his possession, for which he re-



ceives some reward from the bailor; that is to say, the thing, the property which is the subject of the bailment upon which the service is to be performed, as contradistinguished from the mere hiring of labor and service. To illustrate, A., the bailor, delivers to B. (a jeweler), the bailee, his watch to be repaired. A. hires B. to do certain labor upon the thing, his watch, for which he pays a certain compensation; the subject of the bailment is at all times the watch, the watch delivered for repairs, the watch with the labor performed upon it, the watch repaired; and not the labor and skill which repaired it.

§ 118. **General subdivisions of the hiring bailments.**—From what has been said, it will be noticed that this class of bailments naturally divide themselves into three general subdivisions, viz.:

*First.* The hiring of the thing for use.

*Second.* The hiring of work and labor to be bestowed upon or about the thing.

*Third.* The hiring of care and custody of the thing.

These subdivisions will be discussed in the next succeeding chapters.

## CHAPTER IX.

### LOCATIO REI.

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| <p>§ 119. The hiring of the thing for use.</p> <p>120. — A contract relation.</p> <p>121. Bailor's title—Warranty of bailor.</p> <p>122. Bailee's possession—Property interest in the thing.</p> <p>123. Duty of bailor to give notice of defects rendering thing unfit for use or dangerous.</p> <p>124. Bailee—Good faith of—Misuse of thing.</p> <p>125. Conversion—What constitutes.</p> <p>126. — Exercising unauthorized</p> | <p>dominion and control over property—Conversion.</p> <p>127 Bailor's right against third party, against bailee.</p> <p>128. Bailee's liability to third parties for negligent use—Bailee's negligence not imputable to bailor.</p> <p>129. Bailee's right under certain circumstances to assign his interests.</p> <p>130. Extraordinary and incidental expenses.</p> <p>131. Termination of the bailment.</p> |
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§ 119. The hiring of the thing for use.—This class of bailments include the *locatio et conductio rei* bailments—the letting and the hiring of the thing. Let us notice some of the very common examples of this class—examples that are of daily observation to all of us. A. calls on B., who is a liveryman, to hire for his use a horse and carriage to drive from Detroit to Birmingham. B., the liveryman, lets the horse and carriage to A. for use, for a consideration paid by A.—the letting and the hiring of the thing for use. F., a farmer, calls on N., his neighbor, to hire his team of horses and wagon to draw his wheat to the market town. N. lets him have the team and wagon for the purpose of the bailment, viz., to haul F.'s wheat to the market town, and receives from F. a consideration for the use of the thing,—the team and wagon; the letting and hiring of the thing.

Often the consideration or benefit is not so apparent as in the examples given. As, for example, the courts have held that even though the benefit is an indirect benefit, or gaining of advantage or favor, it belongs to this class.

In a Pennsylvania case, *Woodruff v. Painter*,<sup>1</sup> a merchant was held liable for the loss of a cloak of one of his customers who laid it off at his suggestion in order to try on a new cloak which he was endeavoring to sell her, the court holding that he was bound to exercise ordinary diligence in caring for the cloak; that it was in his custody. And so it has been held that a merchant was holden to ordinary care in caring for a watch placed in a drawer of his store at the suggestion of a clerk during the time the customer was engaged in trading. All these cases were upon the theory that there was indirect benefit, the customer in having the property cared for, the merchant in the opportunity to sell his goods, the care of the things, the subject of the bailment, being an incident to the business in which he was engaged. And in a case where the plaintiff, having a horse for which he had no use, to avoid the expense of keeping, requested the defendant to take it and do his work with it in consideration of its feed and keeping, it was held by the Iowa court that this was not a mere *commodatum* or gratuitous loan, under which the defendant would be required to exercise extraordinary care, but a contract for the mutual benefit of both parties, under which the defendant was required to exercise only ordinary care in the keeping and use of the animal.<sup>2</sup> The consideration, as we have said, need not be direct; it need not be a money consideration. Somewhat emphasizing this is the opinion of the supreme court of Illinois in *Francis v. Shrader*,<sup>3</sup> where the court carefully distinguishes between a gratuitous and a mutual benefit bailment. The plaintiff, the owner of a mare, delivered her to the defendant to be broken to service, the defendant to pay no compensation for her use. The mare ran away and was killed. The court below held the defendant to extraordinary diligence because he was to pay nothing for the use of the mare. The supreme court reversed the judgment, holding that it was a benefit to both bailor and bailee, and the bailee, the defendant, should be held only to ordinary diligence, that it was not necessary that money should be paid, if there was benefit to the bailor by reason of breaking the mare to service, and to the bailee by reason of the use of the mare, it was a mutual benefit bailment.

<sup>1</sup> 150 Pa. St. 91.

<sup>2</sup> 67 Ill. 272.

<sup>3</sup> *Chamberlain v. Cobb*, 32 Ia. 6.

§ 120. — **A contract relation.**—This, like other bailments noticed, is created by contract express or implied, the consideration of which rests upon the mutual benefit to each of the parties. Being a valid agreement it may be enforced by either the bailor or bailee, the bailor being obliged because of it to deliver the subject of the bailment into the possession of the bailee and the bailee to receive it, and carry out the purpose of the bailment as expressed or agreed upon.

§ 121. **Bailor's title—Warranty of bailor.**—It is not necessary that the bailor should be the owner of the property, or that he have the absolute title to the thing; the only requisite is that he have such a possessory right to the thing and the use of the thing that he can deliver it to the bailee for the purpose of the bailment. It may be that the only right the bailor has is a lease of the property. The bailor, however, at the time of entering into the bailment relation warrants to the bailee sufficient title or right to the thing bailed to enable the bailee to carry out the bailment. Any failure of the relation to the damage or injury of the bailee because of want of title, or right to grant possession and use for the purposes of the bailment on the part of the bailor, would subject the bailor to an action on the part of the bailee. As, for example, if by reason of superior legal right of a third party the bailee should be deprived of the possession and use of the thing before the expiration of the bailment, and thus damaged, he would have an action against the bailor on account of failure of his title.

§ 122. **Bailee's possession—Property interest in the thing.** From what has been said, it follows that the bailee is entitled to the possession of the thing and its use for the purposes of the bailment. The extent of the rights of the bailee depends, of course, upon the contract and the purposes of the bailment. The possession and use of the thing is a property interest in the bailee, of which he cannot be deprived so long as he fulfills upon his part the bailment contract, except it be by some one who has a better legal right to it than the right or title of the bailor. But as against the bailor, or any persons claiming under him, or who claim by a lesser right or title, the bailee can defend his rights to use and possession.

§ 123. **Duty of bailor to give notice of defects rendering thing unfit for use or dangerous.**—It cannot be said that there

is an implied warranty on the part of the bailor that the thing is fit for the purposes of the bailment, or that its use would not result in danger to the bailee; and yet the obligation of the bailor is very nearly that. So far as he knows, his obligation is a warranty that the thing is fit for the use for which it was hired, and that its use is not dangerous if in its use the bailee exercises ordinary care. And the bailor is bound to know the full facts, if by exercising at least ordinary care he could ascertain them. And if the thing hired for use might in its use be dangerous, and results in death or great bodily harm, then the bailor will be held to have known that its use was dangerous and would so result, if by exercising a high degree of diligence he might have known. If the bailor gave notice of the defect, and, disregarding it, the bailee hired the thing, and by its use was damaged because of its unfitness, in such case the bailor would be relieved of liability; and so if the defect was a latent defect, and by careful examination could not have been discovered by the bailor, and was not known to him at the time of the hiring of the thing. And so it has been held that the plaintiff, bailee, could recover in an action for personal injuries caused by the sudden collapse, while in ordinary use, of a bicycle leased by defendant to plaintiff; the complainant alleging defects in construction, and that the machine was not strong enough for ordinary use, which allegations were not denied.<sup>4</sup> If the bailor should let to the bailee, without notice,

<sup>4</sup> *Moriarty v. Porter*, 49 N. Y. S. 107, 22 Misc. Rep. 536; *Glenn v. Winters*, 40 N. Y. S. 659; *Akers v. Overbeck*, 41 N. Y. S. 382. In *Copeland v. Draper*, 157 Mass. 588, 19 L. R. A. 283, 284, in an action for damages for injuries received from a vicious horse hired from a livery stable, the supreme court of Massachusetts went fully into the law governing such cases. The court, by Holmes, J., say: "*Horne v. Meakin*, 115 Mass. 326, the case relied on by the plaintiff, only decides that if a party negligently furnishes an unsuitable horse, it is not a defense that he did not know that this horse was

unsuitable. In the case at bar negligence was excluded by the plaintiff's admission that there was no evidence that the defendant knew, or by the exercise of reasonable care could have known that the horse was unsuitable, if in fact it was. Therefore in order to recover, the plaintiff must maintain that a livery stable keeper warrants or insures the suitability of every horse which he lets. No such liability is imposed on him by the fact that he follows a common calling, any more than it is upon every man who keeps a shop. . . . If it should be sought to charge the

a vicious horse,—a horse that he knew to be vicious, or by the exercise of care and prudence ought to have known was vicious,—and the bailee should suffer an injury from the use of the animal, the bailor would be liable.<sup>5</sup>

§ 124. Bailee—Good faith of—Misuse of thing.—In this as in all classes of bailments, absolute good faith on the part of the bailee in carrying out the purposes of the bailment is required, and this good faith extends to the use of the thing hired. The bailee would not be permitted to use the thing for

defendant for the horse as for a dangerous animal, the liability for a horse on that ground, apart from bailment, is confined to cases where the owner has notice of the dangerous tendency. *Com. v. Pierce*, 138 Mass. 165, 179, 53 Am. Rep. 264; *Dickson v. McCoy*, 39 N. Y. 400, 403. See also *Hawks v. Locke*, 139 Mass. 205, 208, 52 Am. Rep. 702. The suggestion has been made following Mr. Justice Story's statement of the doctrine of Pothier, that bailors for hire generally warrant the suitability of the thing let (*Harrington v. Snyder*, 3 Barb. 380, 381, Story, Bailments §§ 383, 390); but the common law in general applies the principle of *caveat emptor* when the hirer has examined the article. *Cutter v. Hamlen*, 147 Mass. 471, 475. . . . The supposed warranty, if it existed, could not be placed on any of the foregoing considerations, but would have to stand on the analogy of carriers of passengers, taking their liability in the strictest form in which it ever has been taken. There have been intimations if not decisions in favor of such a view with regard to vehicles let for the known purpose of carrying passengers (*Jones v. Page*, 15 L. T. N. S. 619; *Leach v. French*, 69 Me. 389, 392, 31 Am. Rep. 296;

*Herrington v. Snyder*, 3 Barb. 380, . . . ) but an opposite decision was reached in *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699, and in this commonwealth even carriers of passengers do not warrant their vehicles, and are not liable if wholly free from negligence. *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346; *White v. Fitchburg R. Co.*, 136 Mass. 321, 324; *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379. It follows *a fortiori* that one who lets a horse does not warrant that he is free from defects which he does not know, and could not have discovered by the exercise of due care. See Story, Bailments, § 391a; *Edw. Bailments*, § 373." In *Lynch v. Richardson*, 163 Mass. 163, in a similar case to *Copeland v. Draper*, above cited, the court say, if the liveryman knows of the vicious habit of the horse or "if by the exercise of reasonable care to ascertain whether the horse was suitable for the use of hirers, he ought to have known that it was dangerous, he is liable for such injuries as result from his wrongful conduct. *Palmer v. Coyle*, 187 Mass. 136, 140; *Woodward v. Stein*, 5 Ohio Dec. (Reprint) 171, 3 Am. L. Rec. 352.

<sup>5</sup> *Kissman v. Jones*, 56 Hun, 432.

any other purpose than the purpose named in the contract, or by the contract and its purpose implied. If A. should hire a driving horse from B., he would not be permitted to use him for a dray horse, or put him at plowing.<sup>6</sup> Or if hired to go to one place, as on a journey to Detroit, the hirer would have no right to go to some other place, or drive him a greater distance;<sup>7</sup> or, if the horse were hired for a day, and the bailee should keep him a week,<sup>8</sup> the bailee would be liable.

The question is, Did the bailee use the thing in a different way or for a different purpose than that prescribed or implied in the contract for hiring? The earlier cases were very stringent, holding that when the bailee thus violated the contract by misuse of the property he was guilty of conversion, and would be liable for any injury that overtook the property, even if caused by act of God or inevitable accident; the theory being that by the misuse of the thing, the bailee is guilty of conversion, and all the risks are cast upon him that would fall upon an owner.<sup>9</sup>

§ 125. **Conversion—What constitutes.**—Mere misuse of the property does not constitute conversion. There must be an intentional deviation from the contract—an assertion of right or dominion over the property inconsistent with the bailor's rights and ownership. The New Hampshire court held that "a conversion consists in an illegal control of the thing inconsistent with the plaintiff's right of property."<sup>10</sup> But just what act upon the part of the bailee constitutes conversion of the thing hired has caused a great deal of discussion and disagreement among authors and courts. There is a line of authorities which holds that if the hirer of a horse should drive him beyond the place for which he was hired, that act would be deemed a conversion; and if the animal should suffer injury, even after returning within the limits for which it was hired, the bailee would be liable for conversion of the property. The Massachusetts court, in *Spooner v. Manchester*, held that an intentional deviation from the line of travel is an act of dominion exercised over the horse inconsistent with the rights of the

<sup>6</sup> Lockwood v. Ball, 1 Cow. (N. Y.), 322.

<sup>7</sup> Coggs v. Bernard, 2 Ld. Raym. 909.

<sup>8</sup> Stewart v. Davis, 31 Ark. 518.

<sup>9</sup> Spooner v. Manchester, 133 Mass. 270.

<sup>10</sup> Woodman v. Hubbard, 25 N. H. 67.

owner.<sup>11</sup> Another class of cases holds that if the animal did not receive the injury while being driven without the limits of the hiring, the bailee would not be held for conversion.<sup>12</sup>

§ 126. — **Exercising unauthorized dominion and control over property—Conversion.**—Conversion is a question more or less of intention. There are some acts upon the part of the bailee which would clearly prove such intentional conversion of the property; as, for example, an unauthorized sale of the property.<sup>13</sup> In such case the bailor may take his choice of actions; he may sue the bailee for conversion of the property in an action of trover, or bring an action of replevin against his vendee for the recovery of the specific property, or, if on demand the vendee refuses to yield up the property, the bailor may bring an action of trover as for conversion, or he may affirm the sale and recover from the bailee the amount of the purchase price. The supreme court of New Jersey in the case of *N. Y., L. E. & W. Ry. Co. v. N. J. Electric Ry. Co.*,<sup>14</sup> held that a bailor need not look alone to his bailee for a wrong by a third party in connection with the bailee, as respects the contract of bailment. If a bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion, and the bailor may immediately bring an action of trover or replevin against the third party in whose possession the property is found; that while a mere misuse might not terminate the bailment, yet when, by the negligence of the bailee, either alone or in conjunction with the negligence of a third party, the chattel bailed is no longer fit and suitable for, and cannot be devoted to, the use for which it was hired, the contract of bailment is at an end, and the bailor can maintain his action for the injury done to it.

§ 127. **Bailor's right against third party—Against bailee.**—In the ordinary bailment the bailee has the right to the possession of the property during the existence of the bailment relation, and, as we have seen by reason of his right to the possession he can defend against the bailor or third parties for any unauthor-

<sup>11</sup> 133 Mass. 270.

<sup>13</sup> *Rankin v. Shepherdson*, 89 Ill.

<sup>12</sup> *Farkas v. Powell*, 86 Ga. 800,

455.

<sup>14</sup> 60 N. J. L. 338, 38 Atl. 828; 30 N. H. 164; *Johnson v. Miller*, 16 Ohio, 431; *Rankin v. Shepherdson*, 89 Ill. 445.

<sup>14</sup> 60 N. J. L. 338, 38 Atl. 828; *Story, Bailments* (9th ed.), sec. 413; *Enos v. Cole*, 53 Wis. 235



ized interference; but while the bailee is entitled to this exclusive possession of the property for the purposes of the bailment, the bailor in the usual bailment has a fixed reversionary interest in the personal property. He is entitled to the redelivery of the property at the expiration of the bailment relation in as good condition as when the possession of the same was delivered to the bailee. It therefore follows that the bailor must have the right to defend his title to the property and to sustain an action against either third parties, or even against the bailee, for trespass, for any use of it that is injurious, or which would depreciate its value when it comes to his hands, or that might result in the destruction of the property.<sup>15</sup>

§ 128. **Bailee's liability to third parties for negligent use—Bailee's negligence not imputable to bailor.**—The bailee, having absolute and entire control of the possession and use of the property bailed, necessarily becomes liable to third parties who may be injured by reason of the negligent use of the property; not only does this liability attach because of the negligent use of the property by the bailee in person, but the bailee is also liable for the negligence of his servants in respect to the bailment; but in no case can it be said that the servants of the bailee, in a bailment for hire, are the servants as well of the bailor. And so it follows that the bailor is not responsible to third parties for the negligent use of the property by the servants of the bailee, or by the bailee himself. The bailee does not stand in the place of the bailor; he does not represent him in such a relation as would render the bailor liable for his negligent acts, or for the negligent acts of his servants or agents;<sup>16</sup>

<sup>15</sup> N. Y., L. E. & West. R. Co. v. N. J. Electric Co., 38 Atl. 328, 60 N. J. Law, 338.

<sup>16</sup> Hofer v. Hodge, 52 Mich. 372. The bailee of a chattel is liable for the negligence of a person employed by him to use it. Hall v. Warner, 60 Barb. 198; Mims v. Mitchell, 1 Tex. 443. Where cotton was sent to be ginned and was destroyed by a fire that threatened the gin-house, through the negligence of the bailee's servants, he was held liable to the

owner. (Ala., 1838) Maxwell v. Eason, 1 Stew. 514; McCaw v. Kimbrel, 44 McCord, 220. A. was under a contract with B. to do hauling, A.'s teamster being employed. The teamster fell sick and A. took the horse and cart to B., who told him to leave them and he would furnish a driver if it was necessary. B. directed an incompetent man to drive the horse, who backed him off the dock and the horse was drowned. Held, that the driver was the serv-

and so, while in an action brought by the bailee against third parties for injuries to the property, the third party may defend in the action upon the ground of contributory negligence upon the part of the bailee, his servants or agents; in an action by the bailor, who is the owner of the property, against a third party for injury to the bailment, the negligence of the bailee, or his servants or agents, would be no defense and would not prevent a recovery, for the reason that such negligence is not imputable to the bailor.

§ 129. *Bailee's right under certain circumstances to assign his interests.*—In the ordinary bailment relation, the nature of the bailment and the object to be effected by it forbids that the bailee should have, or should be regarded as having, any assignable interest; and as a general rule any attempt upon the part of the bailee to make such an assignment would be considered as a termination of the bailment and a conversion of the property, and the assignee would not, by reason of the assignment, acquire any interest in the property. Such would be the rule in all cases where the bailment can properly be regarded as a personal trust in the bailee; and such is the case where the bailment is at will, that is, during the pleasure of both parties. There is, however, a large class of bailments, where the bailment contract gives to the bailee an interest in the property not incident to a simple bailment; as where there is no personal confidence reposed in the bailee and it would be entirely in accord with the contract creating the bailment to allow an assignment of his interest; in such cases it has been held that the bailee has an assignable interest which may be transferred to a third party; such assignment not affecting the purpose of the bailment, but being entirely harmonious with the purpose and design of the parties. Examples may be found where resident property is leased for a term of years with furniture for the use of the lessee. If in such case there is nothing to prevent the lessee from subletting the property, he may sublet the prop-

ant of B., and that ordinary care was required in the use of the property. *Hofer v. Hodge*, 52 Mich. 372, 18 N. W. 112, 50 Am. Rep. 256. Where a bailee of goods, intrusted to him to do work upon them, with the knowledge and privity of the bailor employs an-

other to aid in doing the work, and through the negligence and unskillfulness of the latter the goods are injured, the owner may maintain an action against him therefor. *Baird v. Daly*, 57 N. Y. 236, 15 Am. Rep. 488, reversing (1871) 4 Lans. 426.

erty and assign his right to the use of the furniture. So in leases of farm property where the farming implements and stock are upon the farm, the lessee, of course, becomes the bailee of this personal property, and upon subletting the premises could assign his interest as bailee in it.<sup>17</sup>

§ 130. **Extraordinary and incidental expenses.**—This subject has already been discussed,<sup>18</sup> and we need say no more with reference to it except, perhaps, to restate the rule that the bailor would be liable for any extraordinary expenditures; while for the usual incidental expenses the bailee would be liable during the use of the property bailed.

§ 131. **Termination of the bailment.**—Nothing further need be said with reference to the termination of the bailment, as it has already been discussed.<sup>19</sup>

<sup>17</sup> Vincent v. Cornell, 13 Pick. 294; Bailey v. Colby et al., 34 N. H. 29; Day v. Bassett, 102 Mass. 445. If there is an agreement express or implied, a part of the bailment contract, that the property, the subject of the bailment,

is to remain with or be employed by the bailee, the bailee cannot lease or assign his interest. Crocker v. Gullifer, 44 Me. 491, 69 Am. Dec. 118.

<sup>18</sup> *Ante*, § 110.

<sup>19</sup> *Ante*, ch. V.

## CHAPTER X.

### LOCATIO OPERIS BAILMENTS.

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| <p>§ 132. The hiring of labor and service upon the thing.</p> <p>133. <i>Locatio operis faciendi</i>—<br/>The hiring of work and labor upon the thing.</p> <p>134. Contract relation.</p> <p>135. The obligations of the employer, the bailor.</p> <p>136. Bailee has a special property in the thing.</p> <p>137. Whether a sale or a bailment.</p> <p>138. When product from material furnished and labor to be sold and profits divided.</p> <p>139. If the thing is destroyed during the carrying out of the agreement or after finished.</p> <p>140. — The duty of the bailee.</p> <p>141. If the work to be performed by the job, and loss or injury occur before completion.</p> <p>142. The work must be done as contracted.</p> <p>143. —.</p> <p>144. Not every failure to perform contract obligations will deprive bailee of entire compensation.</p> <p>145. If the failure to perform is the fault of the bailor.</p> <p>146. Inevitable accident or irresistible force.</p> <p>147. — Reclaiming the property.</p> | <p>§ 148. Generally bailee may do the work by an agent or servant.</p> <p>149. Where skill as well as care is required.</p> <p>150. He must exercise the skill adequate to the proper performance of the work.</p> <p>151. If the bailee for hire purports to have skill he must use it.</p> <p>152. — Ordinary skill required.</p> <p>153. The degree of skill and diligence increases in certain cases.</p> <p>154. Skilled work by an agent or servant.</p> <p>155. Defenses of the bailee.</p> <p>156. Notice to the bailor that claims for defects must be made within a certain time.</p> <p>157. When will failure of bailor to give notice waive defects.</p> <p>158. Title to the material used by bailee passes to bailor by accession.</p> <p>159. The lien of the bailee in <i>locatio operis faciendi</i> bailments.</p> <p>160. Priority of the lien.</p> <p>161. Agisters and livery-stable men—No lien at common law.</p> <p>162. Lien by statute.</p> <p>163. Chattel mortgage takes precedence over lien.</p> |
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§ 132. **The hiring of labor and service upon the thing.**—This embraces a large class of bailments, and, for a clearer understanding and discussion of the subject, has been divided into—

1st. "*Locatio operis faciendi*," the letting of work and labor to be done upon the thing for hire.

2d. "*Locatio custodiae*," the letting of care and custody of the thing for hire.

3d. "*Locatio operis mercium vehendarum*," the letting of labor in the carrying of goods from place to place, embracing that very important business of carriers of goods, public and private.

In this chapter we shall discuss the subdivision of the *operis* bailments, leaving others for later chapters.

§ 133. **Locatio operis faciendi**—**The hiring of work and labor upon the thing.**—From the consideration of the letting and hiring of the thing discussed in the last chapter, we are led to the consideration of the letting of labor upon the thing, or, as it is more generally called, the hiring of labor and service upon the thing. This belongs to the hiring bailments. The benefits are mutual to bailor and bailee; but whereas in the last chapter we noticed that the bailee was the party to pay the consideration for the use of the thing hired, here the bailor, by the terms of the contract, express or implied, is the party who must pay the bailee for the labor and service bestowed upon the subject of the bailment—the thing. The bailor is the hirer of the labor and service upon the thing, the subject of the bailment, which is his own property, or under his control for the purposes of the bailment.

The jobber sends his cloths to a factory to be manufactured into clothing, for which he contracts to pay; or, a person takes cloth to a tailor to be made into a coat, for which he is to pay a certain sum of money. The person furnishing the cloth is the bailor—the hirer; the tailor, or person manufacturing the coat or clothing, doing the labor and service, is the bailee.

One carries his watch to the jeweler to be repaired, or a jewel to have him set it with gems which he furnishes. One takes his material, lumber, etc., to the boat builder to have him construct a boat, or his boat to be repaired.

Now, it will be observed that the workman, the bailee, is the custodian of the property as well as the one who contracts to bestow the labor upon the thing. Examples are numerous, but

enough has been noted to call attention to the nature and kind of bailment we have under discussion.<sup>1</sup>

§ 134. **Contract relation.**—This class of bailments is also a contract relation either express or implied, and the duties and liabilities of the parties are generally settled. These duties and liabilities may to a certain extent be limited or enlarged by express contract, but if the relation rests in implied contract, the law is well settled as to the extent of the rights of the parties.

§ 135. **The obligations of the employer, the bailor.**—Generally speaking, the law imposes upon the bailor, the employer, if the relation is by implied contract, the following duties or obligations:

(1) To do everything consistent with the employment to be performed on his part to enable the workmen to execute the engagement.

(2) To pay for all necessary, new or accessorial materials.

(3) To pay the price or compensation that is to be paid for the work as agreed.

(4) And finally, to accept the thing when it is finished.

On the other hand it is the duty of the bailee:

(1) To receive, care for and keep all material furnished until the contract is carried out, or is determined.

(2) To perform the service in good faith and as required by the undertaking.

(3) To do the work and produce the result of the undertaking within the time agreed.

(4) To perform the work well, using the skill and judgment required and which the workman claimed would be used upon the subject-matter of the bailment.

(5) To use and employ the material in a proper manner.

(6) To exercise good faith and honest dealing in carrying out the undertaking.

(7) To exercise that degree of diligence in all branches of the performing of the service and using material and accomplishing the object of the undertaking that is required by law in such like cases.

<sup>1</sup> *Locatio operis faciendi*, the hiring of work and labor on the thing, belongs to the mutual benefit bailments, where ordinary diligence is required and the bailee is liable for ordinary negligence.

Lincoln v. Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Zell v. Dunkle, 156 Pa. St. 353, 27 Atl. 38; Gleason v. Beers, 59 Vt. 581, 10 Atl. 86, 59 Am. 757.

(8) To deliver the property to the bailor when the bailment contract is fulfilled or otherwise terminated.

§ 136. **Bailee has a special property in the thing.**—In this class of bailments, from its very nature, it will be seen that the bailee not only has the right to the possession, but has a special property in the thing bailed, and perhaps a greater interest than in other classes of bailment, because in the performance of the bailment he necessarily mingles with the property of the bailor furnished to him his labor, and often material, in order to carry out the contract; and more than this, he has the property by contract and is employed to do upon it certain work and labor, and thus reap a benefit to himself. And so it follows that, as the bailment advances, the interest of the bailee must increase in value; so it has been held that the bailee may maintain trover or replevin against a party who undertakes to deprive him of it, even against the bailor if he should so undertake before the time stipulated for the carrying out of the contract, or before the bailee has made such default as would terminate the relation. And so the bailee, without question, may not only maintain an action against third parties for an injury to his possession, and as to that he is the only party who can during the continuance of the bailment maintain such an action, but the general current of authority seems to be that he may include in such suit damages for the entire injury to the subject of the bailment; but while this right of action is given the bailee, no case can be found that denies the right of the bailor to sue and recover for the permanent injury to the property, even before the expiration of the bailment. This is upon the principle that the bailor has a reversionary interest in the property, and one having such an interest has a right to sue one who is not in possession thereof for an injury to such property which will depreciate its value when it comes to his hands, and is entitled to recover damages to the extent of the injury.<sup>2</sup>

<sup>2</sup> Shearman & Redf. Neg., sec. 119; Howard v. Farr, 18 N. H. 457; N. J. Electrical Ry. Co. v. N. Y. L. E. & W. R. R. Co., 61 N. J. L. 287, 43 L. R. A. 849; Brief, 43 L. R. A., p. 853; Shaw v. Kaler,

106 Mass. 448; Leoncini v. Post, 13 N. Y. S. 825; Butts v. Collins, 13 Wend. 139; McGraw v. Patterson, 47 Ill. App. 87. As to gratuitous bailee, Chamberlain v. West, 37 Minn. 54, 33 N. W. 114.

§ 137. **Whether a sale or bailment.**—It is contemplated in this class of bailments that the bailor furnishes to the bailee the thing or the materials from which the thing is to be produced, and that the bailee, the workman, is to produce the thing, or, if a thing that has already been produced and is delivered to him for repairs, to make such repairs upon it; that the property, the thing and the materials, are the property of the bailor, to which is to be added the service, work, or skill of the bailee. As, for example, the cloth taken to the tailor to manufacture coats, the undertaking or bailment contract being that for a certain consideration the workman, from the cloth furnished him, will furnish to the bailor a certain number of coats manufactured; this would be a bailment contract, the manufactured coats would be the property of the bailor. Nor is it necessary that the bailor should furnish all of the material, nor does the law lay down any fixed or settled rule as to just what proportion of the material must be furnished in order that the bailment should be sustained; but in cases where the bailor, or employer, did not furnish any of the material, as, for example, in a case where the undertaking was on the part of the workman to furnish to the employer a certain number of coats, the workman furnishing both material and labor, there could be no question but that such an agreement would be a contract of sale and not of bailment. This question will be met as we come to consider the liability of the parties in cases where the property is lost or injured.

While there is no fixed or settled rule as to the proportion of the material the bailor or employer is bound to furnish in order to establish the bailment relation, it seems to be generally conceded that the bailor should furnish the principal part of the material.

§ 138. **When product from material furnished and labor to be sold and profits divided.**—Considerable discussion has been had as to whether, where material has been furnished by the bailor to be wrought upon by the bailee, the product of the material and labor to be sold in the market, and the net profits obtained from the material to be divided between the bailor and bailee, it is a bailment relation or a mere joint undertaking or a partnership agreement. A late case in the state of New York, *Sattler v. Hallock*,\* has discussed this question, holding

\* 15 App. Div. Sup. Ct. N. Y. p. 500.



that in such case the relation is a bailment relation; and in an earlier case, *Gregory v. Stryker*,<sup>4</sup> the court says: "Various cases have arisen in which property in a raw state was delivered by one person to another upon agreement that it should be wrought upon and improved by the labor and skill of the bailee, and when thus improved in value should be divided in certain proportions between the respective parties, and in which it was held that the original owner retained his exclusive title to the property until the contract had been completely executed, and this, notwithstanding the labor to be performed by the bailee might be equal or even greater in value than that of the property when received by him."

And where plaintiff and his assignors entered into an agreement with the defendant by which the defendant agreed to manufacture cheese and butter from milk delivered at his factory by the plaintiff and his assignors, to sell the product and distribute the proceeds according to a contract between them, the factory having been destroyed by fire, and a quantity of the milk, butter and cheese thereby lost, in an action to recover the amount of the loss it was held that the contract was one of bailment, and defendant assumed simply the duty to exercise ordinary care to protect and preserve the property; that the burden of the proof was upon the plaintiff to show a failure to perform his duty; that no presumption of negligence arose from the fact that the loss resulted from the fire. The court says:

"It is true that where an absolute executory contract is made, the contractor is not excused by inability to execute it caused by unforeseen accident or misfortune, but must perform or pay damages unless he has protected himself against such contingency by stipulation in the contract. But there may be in the nature of a contract an implied condition by which he will be relieved from such unqualified obligation, and when in such case, without his fault, performance is rendered impossible, it may be excused. That is so when it inherently appears by it to have been known to the parties to the contract and contemplated by them when it was made, that its fulfillment would be dependent upon the continuance or existence, at the time for performance, of certain things or conditions essential to its execution. Then in the event they cease, be-

<sup>4</sup> 2 Denio, 631.

fore default, to exist or continue, and thereby performance becomes impossible without his fault, the contractor is, by force of the implied condition to which his contract is subject, relieved from liability for the consequences of his failure to perform.

"By the contract now under consideration, the cheese and butter were to be manufactured at this factory, and to be made from the milk furnished by the patrons, of whom the plaintiff and his assignors were members. The existence of that particular factory was terminated by its destruction, and the loss with it of the manufactured product and of the milk then remaining there unconverted into cheese and butter rendered it impossible for the defendant to further proceed with the performance of his contract in respect to those articles of material and product. And as the nature of the agreement was such that it must be deemed to have been contemplated by the parties to it that the articles to be manufactured should be made only from the materials furnished by the patrons and at the factory referred to, there was necessarily an implied condition so qualifying the defendant's undertaking as to relieve him from performance rendered impossible without his fault, and from the consequences of his inability thus occasioned to fulfill his contract in respect to the subject of the bailment which was destroyed by the fire."\*

\* *Stewart v. Stone*, 127 N. Y. 500. In *Hyde v. Cookson*, 21 Barb. 92, there was a written agreement between the plaintiffs and one Osborn in relation to tanning a quantity of hides. The hides were to be furnished by the plaintiffs on a commission of five per cent. for buying and six per cent. for selling the leather. Osborn was to take the hides to his tannery, manufacture them into hemlock sole leather, and return it to the plaintiffs who were to sell it in their discretion. When sold, the account was to be made up, and the net proceeds of the sales, after deducting the costs of hides, commissions, interest, insurance and other expenses, were to be the

profit or loss to accrue to Osborn in full for tanning the hides; and it was held that this was not a contract of sale, but of bailment, and that the title remained in the plaintiffs. In *Pierce v. Schenck*, 3 Hill, 28, logs were delivered at a saw-mill under a contract with the person running the mill that he would saw them into boards, and that each party should have one-half. It was held that the transaction was a bailment; that the bailor retained his general property in the logs until they were all manufactured in pursuance of the contract; and that, as between the parties, the bailee acquired no interest in any of the boards manufactured by mere

§ 139. If the thing is destroyed during the carrying out of agreement, or after finished.—It will be observed that by the very nature of the bailment relation that is created in this class of bailments the title to the property remains in the bailor during the time that the work and service is being performed upon it by the bailee, and therefore it follows that if the property should be destroyed at any time by reason of internal defects, inevitable accident or irresistible force, and without the fault or negligence of the workman (the bailee), the loss would necessarily fall upon the bailor; and because the thing under such circumstances at the time of the loss was the property of the bailor with all the labor and accessorial material added, it necessarily follows that the workman would be entitled to recover from the bailor compensation for the labor he had bestowed upon the thing up to the time it perished or was destroyed, and would also be entitled to compensation for any material furnished by him in carrying out the undertaking.\*

part performance within the time. In *Mallory v. Willis*, 4 N. Y. 76, the plaintiffs agreed to deliver merchantable wheat at a flour-mill carried on by the defendant, to be manufactured into flour. The defendant agreed to deliver one hundred and ninety-six pounds of superfine flour, packed in barrels to be furnished by the plaintiffs, for every four bushels and fifteen pounds of wheat. He was to be paid sixteen cents per barrel, and two cents extra in case the plaintiffs made one shilling net profit on each barrel of flour. The defendant was to guarantee the inspection. The plaintiffs were to have the offals or feed, which the defendant was to store until sold. This court held in that case that the contract imported a bailment, and not a sale. The doctrine of that case was indorsed in *Foster v. Pettibone*, 7 N. Y. 433. In *Mack v. Snell*, 140 N. Y. 193, 35 N. E. 493, the parties entered into a contract by which

the plaintiff agreed to manufacture for the defendant one thousand pairs of pruning shears, to be in all respects like a sample furnished, the defendant to furnish the rough castings for the handles and the plaintiff to furnish the blades. It was held that the contract was one of bailment, and not of purchase and sale, so that the title to the shears manufactured was at all times in the defendant.

\* Cloth furnished by defendant to be manufactured into garments, when partially completed was destroyed by fire without fault of the plaintiff; held that the bailor, the defendant, must lose both the material and labor, for both are his property; and that the bailee can recover for his labor on the material furnished. *Labowitz v. Frankfort*, 23 N. Y. S. 1038; *Labowitz v. Solomon*, 23 N. Y. S. 1040; *Cohen v. Moshkowitz*, 39 N. Y. S. 1084. Unless contract imports different obliga-

One cannot but notice here that the rule would be very different in the case noted in a former paragraph where the workman, or the bailee, furnished all of the material as well as all the labor, and from the material and labor was to produce for the employer certain manufactured articles; in such case, if the articles in process of manufacturing, or after they were completed, but before delivery, should be destroyed, the workman could not recover from the employer compensation for his labor and material, for the reason that the thing would not be the property of the purchaser, but would be the property of the workman.

§ 140. — **The duty of the bailee.**—The bailment relation here created is one for the benefit of both bailor and bailee, and therefore ordinary diligence is required and the parties are liable for ordinary negligence. As we have noticed, it is the duty of the bailee to receive, care for and keep the materials or things furnished for the undertaking until delivery to the bailor according to the contract, or until for other reasons the bailment is terminated; to perform the services in good faith, and as required by the undertaking; to do the work well and produce the result of the undertaking within the time agreed upon; to use the skill and diligence required, or the skill and judgment claimed by him, the bailee, to be required to exercise good faith in all things pertaining to the contract, deal honestly and redeliver the property to the bailor when the contract is fulfilled. And in this class of bailments a further duty resting upon the bailee is, that in exercising all and each of these requirements he must use ordinary diligence, and if he fails to do so and injury results therefrom to the bailor, he will be liable therefor. If, however, the injury was the result of failure on the part of the bailor, or the employer, to perform his duty, and his failure contributed to the injury or loss, it would excuse the bailee from liability. The question of liability will be considered later.

tion. *Rothseer v. Cosil*, 79 N. Y. S. 855. Has been held that the bailee is entitled to compensation for his labor, although he was guilty of unreasonable delay. *Wilcox Sewing Machine Co. v. Himes*, 21 N. Y. S. 760; *Bigby v. Coombs*,

64 Mo. 529; *Cullen v. Lord*, 39 Iowa, 302. The bailee must show that the loss was without his negligence or fault. *Sulpho, etc., Co. v. Allen*, 66 Neb. 295, 92 N. W. 354; *Hildebrand v. Carroll*, 106 Wis. 324, 82 N. W. 145.

§ 141. If the work is to be performed by the job and loss or injury occur before completion.—We have already stated that where the title to the thing and the materials furnished remain in the bailor, or employer, during the performance of the work by the workman, and the property is lost without his fault, as by inevitable accident, internal defects, or irresistible force, the workman is entitled to compensation for his labor and for the material furnished. The rule, however, seems to be different where the contract for the labor is an entirety, as, for example, where the labor is to be performed by the job, and the loss occurs before the work or the thing to be produced is completed; in such case the rule is that the thing would perish to the employer, and the work to the mechanic. That is to say, the employer would lose the material that he had furnished for the thing that was being repaired or produced, and the laborer would lose the labor that he had bestowed upon it. If, however, it should appear that the loss was occasioned by reason of want of diligence on the part of the bailee in taking care of the property, and that the injury was the result of his fault, in such case the bailee would have to respond to the bailor in damages for the loss of the property thus occasioned. But if at the time the loss occurred the job had been completed, but not delivered, and it was not the duty of the bailee to deliver the completed article, and the loss or damage was not the result of his fault or negligence, the bailee would be entitled to compensation for his labor because the title to the completed article would be in the employer. This is very well illustrated by the court's opinion in *Cohen v. Mashkowitz*,<sup>1</sup> in a case where defendant employed the plaintiff, a tailor, to put together sixty-six garments; he had a part completed, but failed to send them as he agreed to do; on the night of the day following the day he was to have delivered the finished portion, the building burned and the garments were destroyed. The court say: "As the material belonged to the defendant, the contract between him and the plaintiff was one of bailment, and of that class tech-

<sup>1</sup> 39 N. Y. 1084; *Archer v. McDonald*, 36 Hun, 194; *McConihe v. Railway Co.*, 20 N. Y. 495; *Story, Bailments*, sec. 421. In *Cohen Case*, quoted in text, the job not finished was to have been delivered by plaintiff but was not.

In *Labowitz v. Frankfort et al.*, 23 N. Y. S. 1038, job was finished and defendant was to take the manufactured articles. Court held plaintiff not in fault and could recover for his labor. *Central, etc., Co. v. Moore*, 75 Wis. 170.

nically called *locatio operis faciendi*, applicable 'to the hire of tailors to make clothes, of jewelers to set gems, and of watch-makers to repair watches.' In such a case, if, while the work is being done on a thing belonging to the employer, the thing perishes by internal defect or inevitable accident, without any default of the workman, the latter is entitled to compensation to the extent of his labor actually performed on it, unless his contract import a different obligation; for the maxim is, '*Res perit domino.*' The rule is said to be: (1) If the work is independent of any materials or property of the employer, the manufacturer has the risk, and the unfinished work perishes to him; (2) if the bailee is employed in working up the materials, or adding his labor to the property of the employer, the risk is with the owner of the thing with which the labor is incorporated."

Judge Story in his work on Bailments<sup>\*</sup> says: "But suppose there is a contract to do work on a thing by the job (as, for example, repairs on a ship) for a stipulated price for the whole work, and the thing should accidentally perish or be destroyed without any default on either side, before the job is completed, the question would then arise whether the workman would be entitled to compensation *pro tanto* for his work and labor done and materials applied up to the time of the loss or destruction. It would seem that by the common law, in such a case (independent of any usage or trade), the workman would not be entitled to any compensation, and that the rule would apply that the thing should perish to the employer and the work to the mechanic; for the contract by the job would be treated as an entirety, and should be completed before the stipulated compensation would be due."

§ 142. **The work must be done as contracted.**—The employer is entitled to have the work done according to the contract, and failure to thus perform the work might result in non-liability of bailor for compensation. In considering this class of contracts it must at all times be borne in mind that the thing, the subject of the bailment and of the contract, is the property of the bailor or the employer, and the parties do not stand in the relation of vendor and vendee. The taking possession of the property by the bailor after the work has been performed is

<sup>\*</sup> Story, Bailments, sec. 426; 2 Kent's Com. 590, 591; Schouler, Bailments, 111.

not an acceptance of the work, or in any sense a waiver of the bailor's demand that the contract be fulfilled.

If the parties stood in the relation of vendor and vendee, or buyer and seller, it would be the duty of the buyer to reject the goods because of failure of the seller to carry out the agreement and to act promptly, and if he did not refuse the goods, to express his dissent at once, and thus enable the vendor to protect his interest; but in this case the property belongs to the employer; he has a right to it; and it is a question simply of paying for the labor and the accessorial materials, and so the bailor may take the property and refuse to pay for the labor and material because of failure to do the work as agreed by the bailee.

The question has often been raised where the work was contracted to be done according to sample, and perhaps this class of cases would more squarely raise the question.<sup>9</sup>

<sup>9</sup> *McKibben v. Bakers*, 1 B. Mon. (Ky.), 120; *Dale v. See*, 51 N. J. L. 378, 18 Atl. 306, 14 Am. St. 688, 5 L. R. A. 583. In *Mack v. Snell*, 140 N. Y. 193, the court held that where the plaintiff failed to produce the article according to the contract, the bailor would not be held for compensation. The court say: "They (plaintiffs) wholly failed to perform their contract in its true scope and meaning. It is plain that under the general rule no compensation can be demanded by the plaintiffs, the consideration upon which the defendant's promise rested has never been furnished. The defendant, it is true, has title to the shears, but this is because he owned the materials out of which they were made; the articles he contracted for had never been furnished. In the place of these were furnished articles useless and valueless because of defects in construction not existing in the sample shears. The claim is made, however, that

the plaintiffs are entitled to recover on the contract, not on the ground of performance, but by reason of the omission of the defendant to reject and return the shears delivered. . . . Or to notify the plaintiff that they did not conform to the contract. The silence of the defendant, it is claimed, operated in law as an acceptance of the shears delivered, and precludes him from claiming that those subsequently manufactured of the same kind were defective." The court here distinguishes between the bailment contract and an executory contract for the manufacture and sale of articles of a specified kind, and holds that the rules governing an executory contract for manufacturing the chattels does not apply in the case at bar. When garments were delivered for alterations and repairs which were so unskillfully done that they were rendered unfit for the owner's use, it was held that the bailor could refuse to accept

§ 143. —. As we have said, it is incumbent upon the workman to do the work in accordance with the contract by which it is undertaken. If the contract is not written, there are certain implied obligations that apply to every undertaking, and so it may be said that in every case the workman is bound to do the work reasonably well, that is, in a workman-like manner, using such skill and judgment as the undertaking requires, and such as the workman claims to possess; producing the result of the undertaking within the time stipulated without waste or damage to the employer; using the material furnished in a proper manner, and withal exercising good faith in the performance of the work. If, therefore, the work has not been so performed, if the contract has not been kept, but by reason of the performance thereof on the part of the bailee a defense is afforded to the employer against a demand for the payment of the price, that the work was defectively or improperly done, that same defense will be equally available to the employer after the loss. Judge Story says,<sup>10</sup> "this seems to be the doctrine of the Roman law," and it is also the doctrine of the common law.

§ 144. Not every failure to perform contract obligations will deprive bailee of entire compensation.—Generally, if the work is being done under a special contract, the terms of that contract must be carried out, and if the workman fails to produce the thing as contracted, he will have no remedy under the contract. As, for example, if a workman contracted to build a house according to certain specifications, he could not recover if he failed to build the house in accordance with the specifications; or, if he did the work unskilfully or improperly, or failed to complete it, he could not recover under the contract. If the work was not completed the contract would be unexecuted, and he could not recover while thus in default. The law requires that he perform his undertaking.

And where the workman does work under a general contract for hire, he is held to a performance of his contract and to use good faith in its performance; but the rule of law depriving the workman of any compensation is not so fixed as in case of a special contract, and seems to have somewhat relaxed, and

them and recover for their value of the bailee. *May v. Gunther*, 46 N. Y. S. 379; *Jones v. Foreman*, 98

Iowa, 198; *Higman v. Comody*, 112 Ala. 267.

<sup>10</sup> Story, Bailments, sec. 420.



may now be said to have settled down to this: If the work is so badly and improperly done that the thing produced totally fails of being of any use or value, or is wholly inadequate for the purpose for which it was designed, the workman cannot recover compensation; on the other hand, he might be liable to the employer for the materials used and for damages if they resulted; but if the thing produced has some value, although imperfectly and inefficiently done, the workman, under a *quantum meruit* count, might recover the amount it would be actually worth to the employer under all the circumstances.<sup>11</sup>

If the property or thing is left unfinished, or is badly or unskilfully wrought upon by the bailee, all because of the wanton and wilful neglect and refusal of the workman to perform his duty in this regard, the workman at most could recover no more compensation than the amount remaining after deducting the damages resulting from his failure to perform his contract from the amount he was to have received;<sup>12</sup> or the employer may disregard him and hire others to complete the work and pay them therefor out of the contract price agreed upon between the bailor and original bailee; the balance, if any, would belong to the bailee, unless reduced by other resulting damages.

§ 145. If the failure to perform is the fault of bailor.—It goes without saying, that if the bailee is prevented from executing his contract by reason of the fault of the employer, as, for example, by failing to furnish material as stipulated, or in any way hindering or obstructing the work of the workman, or if the plans were altered and the work was thus made more difficult, in such case the workman would not be deprived of compensation on account of failure to complete the work at the time stipulated, or in accordance with former plans. And if the workman was prevented from completing the contract by the employer without just cause or reason, he would be entitled to recover what his services were reasonably worth, in an action for work and labor and material furnished.

<sup>11</sup> Grant v. Button, 14 Johns. 377.

<sup>12</sup> Faxen v. Mansfield, 2 Mass. 147. These cases are very different from the cases discussed under a preceding section (*ante*, § 141), there the work had

not been completed when the entire subject of the bailment was destroyed and plaintiff was in default for not delivering the product. No benefit could accrue to the owner, no *quantum meruit* action could be invoked.

§ 146. **Inevitable accident or irresistible force.**—And so if the workman was prevented by reason of inevitable accident from performing the contract and was in no way in fault himself, he would be excused for the failure and would not be deprived of compensation to the extent of the reasonable worth of his labor; but in such case the bailor would not be made to suffer by being compelled to pay for more than was really done upon the contract. In all such cases the bailee must be able to show that he exercised ordinary care and diligence to avoid the accident or force, and acted honestly and in the utmost good faith.

§ 147. — **Reclaiming the property.**—This principle may be carried further, and it may be laid down as a rule well settled that the bailee, acting honestly and in good faith, may and should use reasonable diligence in reclaiming the property that has been injured or temporarily lost by reason of inevitable accident or irresistible force, and to the extent that reasonable diligence requires it in the care and protection of the thing, the bailor will be compelled to compensate the bailee for thus reclaiming the property. As, for example, if the property has been swept away by flood, the bailee, when he finds it, should return it to his control and possession, and if such an act would be adjudged the conduct of a reasonably prudent man, the bailee may recover reasonable compensation for the extra labor thus bestowed upon the thing.

§ 148. **Generally bailee may do the work by an agent or servant.**—As a general rule the bailee may perform the labor by other persons employed for the purpose; except in cases where the very nature of the employment requires the personal labor and attention of the workman employed; as in case of employing a portrait painter to paint a picture, or a professional man to do some work calling for his personal skill in the performance. But in cases where the work may be delegated to others, the bailee may employ agents or servants to perform the labor or assist him in the undertaking. The bailee is liable for the acts of his servants or agents while engaged in carrying on the work, or engaged within the scope of the employment, but they cannot be held to be in any respect the servants or agents of the bailor. Nor are the servants of the bailee the servants of the bailor, nor in any sense acting for him; and so it follows that the liability of the bailor and bailee

to third parties is entirely independent the one of the other. In the case of *New York, L. E. & W. Ry. Co. v. New Jersey Elec. Ry. Co.*, this question was fully discussed. There the question of contributory negligence of the bailee was claimed to be a defense in an action brought by the bailor, and in the discussion of this question the court fully defines the rights and liabilities of the parties in respect to like cases;<sup>13</sup> the court holding that in an action by the bailor or owner of the property for its damage or destruction, the defendant, third party, cannot defend upon the ground that the bailee, who at the time had the property in his possession and control, was guilty of contributory negligence; that in no way could the use of the property by the bailee affect the right of action of the bailor.

§ 149. *Where skill as well as care is required.*—We are here to deal with a higher class of *locatio* bailments. The subject embraces that class of labor and care upon the subject of the bailment that is usually denominated skilled labor and care, which, though but ordinary in its class, is nevertheless very much more than the ordinary care required in the ordinary and usual bailment relation. It may be well understood that the workman who is to receive material for the construction of a fine and difficult piece of mechanism, as, for example, an expensive piece of jewelry to be set with costly gems; or the construction of an expensive watch, or a carefully-constructed mathematical instrument, must of necessity possess greater skill and be required to exercise a higher degree of care than the blacksmith who is to construct a horseshoe from iron at his forge, or the carpenter

<sup>13</sup> N. Y., *L. E. & W. Ry. Co. v. N. J. Elec. Ry. Co.*, 60 N. J. L. 338, 38 Atl. 828. Held, the servants of the bailee in a bailment for hire are not the servants of the bailor, and he is not responsible to a third party for negligence of the servants of the bailee in respect to the bailment. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for the negligent acts of the bailee or his servants or agents;

and while, in an action by the bailee for injuries against a third party, occasioned by his negligence, the contributory negligence of the bailee or his servants or agents will constitute a defense to the action, yet in an action by the bailor, who is the owner, against a third party, for injury to the bailment, the negligence of the bailee or his servants or agents is not imputable to such bailor, and will not prevent a recovery.

who is to build a board fence for the farm, or a cattle-barn, and yet the rule of law as generally stated in each case would be the same. First of all, it may be said that when skill as well as care is required by the workmen, the law requires of him that—

§ 150. **He must exercise the skill adequate to the proper performance of the work.**—The very work itself carries with it notice to the workman that it requires more than ordinary labor; that whoever undertakes to perform the labor must possess the skill, and a degree of skill peculiar to the particular requirements of the particular piece of work. If the bailor brings fine gold and costly gems from which he desires constructed a beautiful necklace, this of itself notifies the workman that it requires a skilled workman to do this work. The law does not put this upon the ground of a warranty either express or implied, it is a common-law liability which requires the bailee, the workman, to perform the work with that skill and ability which the particular work requires; he is bound to use such reasonable skill as the undertaking demands.<sup>14</sup> In *Lincoln v. Guay*,<sup>15</sup> cloth was delivered to a dressmaker to be made into a dress without any instructions; the dressmaker made up the cloth wrong side out. The Massachusetts court held that an action could be maintained against her. The court say: "If the dress was delivered to the defendant by the plaintiff without any instructions, the defendant being a bailee for hire was held to that degree of skill and care, in the particular occupation in which she was engaged, which was that of a dressmaker, which would enable her to do the work intrusted to her in a reasonable and proper manner."<sup>16</sup>

"The relation of the bailor to the bailee is a personal one, and grows out of the confidence the bailor is presumed to repose in the skill and fidelity of his bailee when intrusting his property to him for the service intended to be performed upon or toward it. The law implies a contract upon the part of the

<sup>14</sup> *Kuehn v. Wilson*, 13 Wis. 104. In *Beal v. South Dover R. Co.*, 3 H. & R. 337, 11 L. T. (N. S.), 184, in discussing the duties of a bailee for hire the court said from him "is reasonably expected care and diligence, such as are exercised in the ordinary and proper course of similar business

and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment." *Morton v. Fairbanks*, 11 Pick. (Mass.), 368.

<sup>15</sup> 164 Mass. 537.

<sup>16</sup> *Jackson v. Adams*, 9 Mass. 484; *Story, Bailments*, sec. 431.

bailee to perform the service skilfully, and then to return the chattel faithfully on payment for his service.”<sup>17</sup> “Every mechanic who takes any material to work up for another in the course of his trade, as where a tailor receives cloth to be made up into a coat, or a jeweler a gem to be set or engraved is bound to perform it in a workmanlike manner.”<sup>18</sup>

§ 151. **If the bailee for hire purports to have skill he must use it.**—The question is not, has the bailee the skill required to do the work in the given case—the very fact that he holds himself out as one who can do the kind of work required is enough. If he solicits the like kind of work by personal solicitation or by advertising, he is bound to exercise the skill required, and the law imposes upon him ordinary care in using the skill he claims to have. If the bailee actually possesses the skill required, the law presumes that he is employed because of that fact, and that the bailor has, by reason of the employment, secured not only the performance by him of the labor necessary to carry out the obligation, but that he has also employed and is entitled to his skill and judgment in doing the work required. The maxim of the law in such like cases is “*Spondet peritiam artis*:” he promises to use the skill of his art; and to do anything less than that would be a want of that ordinary care and diligence which the law requires the bailee to exercise; it would be such negligence as would support an action on the part of the bailor.<sup>19</sup>

§ 152. — **Ordinary skill required.**—This, it will be remembered, is a mutual-benefit bailment, and so the rule obtains that in the performance of the particular work the bailee is only held to exercise ordinary skill; but ordinary skill in this class of labor is upon a higher plane than in cases where the labor required is unskilled labor. It is such skill as the ordinarily skilful workman in such kind of work would exercise upon his own material in performing the same kind of service under just such

<sup>17</sup> *Rogers v. Grothe*, 58 Pa. St. 414.

<sup>18</sup> 2 Kent's Com. 588; *Keith v. Bliss*, 10 Ill. App. 424.

<sup>19</sup> Where skill is required ordinary diligence requires the performance and use of competent skill. And it has been held that acceptance of the article produced

will not relieve the bailee from consequences arising from inefficient work. The title of the produced article from material furnished is in the bailor and acceptance of the article does not accept the work or waive the claim for defective work. *Mack v. Snell*, 140 N. Y. 193, 35 N. E. 493.

circumstances; he must exercise the skill he has; the skill the undertaking requires, and nothing less.<sup>20</sup> This is ordinary skill in this class of service, and not extraordinary.

§ 153. **The degree of skill and diligence increases in certain cases.**—From what has been said it may be inferred, and it is the law, that the degree of skill and diligence increases in proportion to the value, difficulty of performance, and delicacy of the particular work to be done or undertaking to be accomplished; as, for example, if one is employed to make iron into stove castings, the requirements would not be so difficult and particular as an employment to construct some sensitive mathematical machine; a slight mistake in the former case might be overlooked, but a very slight mistake in the latter would render the entire machine and all the material and labor valueless.

§ 154. **Skilled work by an agent or servant.**—To just what extent the bailee for hire can perform the obligation, or do the work by agent or servants in this class of service, it would be difficult to say except in a particular case. But by way of a general rule it might be said that the employment is generally on account of the personal skill of the bailee, and whenever that is true he cannot delegate the work to another. "*Spondet peritiam artis*," we must remember, is the maxim; it is the art of the bailee himself that has been employed and not the art of another.

If one who is a portrait painter has been employed to make a fine portrait, the artist would hardly be justified in employing another to do his work; or if one, because of his particular ability at decorations, were employed to decorate a house, the employer would be entitled to his personal efforts and skill, and would not be bound to receive the work of another. On the other hand, if the employment were such that others could assist and not infringe upon that personal engagement, as where the labor given to the agent or servant is but common and ordinary, such work as the ordinary workman or person employed could do, in such case it could be delegated.

<sup>20</sup> Dale v. See, 51 N. J. L. 378, 381, 18 Atl. 306, 5 L. R. A. 583, held that where defendant received material from plaintiff upon which he was to do work for reward, incident to such a

bailment, and from the act of employment, the law implies an undertaking that the work shall be done with due care and competent skill.

§ 155. **Defense of the bailee.**—Some of the defenses of the bailee in this class of bailment have been adverted to. It is ordinary skill that is required and not extraordinary.

(1) *So, if the bailee can show that the skill and care exercised in the particular case was ordinary*, such skill as we have already defined as ordinary, and that the skill claimed by the bailor would be more than ordinary—would be extraordinary,—this would be a good defense. Or,

(2) *If bailor dictated how the work should be done and it was so done*,—in other words, if it was not the skill of the bailee which he desired to be exercised, but the bailor or employer persisted in using his own judgment as to the manner of doing the work, the bailee not being permitted to perform the service as he would have performed it because of the demands of the bailor that it should be done otherwise, and the work was done in all respects in accordance with the orders and judgment of the bailor rather than according to the judgment and desire of the bailee, in such case the bailor could not sustain an action against the bailee for failure to perform the work skilfully, or in accordance with the skill and judgment required in the particular case. Or,

(3) *If on account of defects in property or material furnished by the bailor the result was not satisfactory*, the bailee would not be liable; for it is the duty of the bailor to furnish material fit for the work, material in the use of which the result required could be attained; if the material is not fit, and especially if the bailee before commencing the work or before using the material, had notified the bailor of his inability to accomplish the desired result on account of the unfitness of the thing or the material, and after such notice the bailor insisted upon going on with the work, in such case the bailor could not sustain his action. As, for example, the jeweler is called upon to set fine gems, and the gems furnished are broken or defective; or the miller to produce first-class flour from wheat, and the wheat furnished is of poor quality; or the cabinet-maker to build fine furniture, and the lumber furnished is unfit. Or,

(4) *If bailor refuses to furnish necessary funds to purchase needed articles and insist that the amount furnished shall be expended*, and the best it will purchase be used, and the bailee purchases, and exercises ordinary judgment and skill in mak-

ing the purchases, the bailor will not be heard to say that the article is deficient because the article so purchased was not suitable for the purpose, and that therefore the product of the workman is defective. Or,

(5) *If the bailor knows that the bailee has not the skill required*, and still with such knowledge employs him to do the work, and the thing is defective and not skilfully wrought, in such case the bailor could not recover in an action for damages on the ground of want of ordinary skill in the bailee. The law will not allow the bailor to use his rights or privileges as a weapon to inflict injury; it can only be used as a protection from wrong-doing and to remedy an injury resulting without fault on his part. To allow recovery in such a case would be to put a premium upon bad faith or carelessness, whereas the utmost good faith and reasonable care is required as well on the part of the bailor as on the part of the bailee.

§ 156. Notice to the bailor that claims for defects must be made within a certain time.—Upon a bailment of goods *locatio operis faciendi*, to do work upon them for a reward, the contract implied by law that the work shall be done with due care and competent skill, arises immediately upon the delivery of the goods to the bailee; and upon the completion of the work for which the bailment was made, it is the duty of the bailee to return the goods to the owner, and no notice imposing conditions upon the implied contract given to the bailor after the work is completed would be binding. This principle was well illustrated in the case of *Dale v. See*<sup>21</sup> by the supreme court of New Jersey. A manufacturer sent silk twist to a dyer to be dyed, relying upon the implied contract of dyers to use the proper degree of skill. The twist, after being dyed by the defendants, was returned to plaintiffs, who wove a part of it into silk braids. Subsequently, and in a short time, these braids were found to be of greatly inferior value on account of their being oily, which oily condition was due to unskillful dyeing. The defendants, on returning the dyed silk to the plaintiffs, sent their bill for the same, upon which was printed the following notice: "All claims for deficiencies or damages must be made within three days from date, otherwise not allowed." No notice was given the defendants by the plaintiffs until several months after they received

<sup>21</sup> 5 L. R. A. 583, 51 N. J. L. 378. See cases cited.



this notice. The court held that this was no defense in case of bailments "*locatio operis faciendo*," that the contract between the parties arose immediately upon the delivery of the materials to the bailee, and the bailee could not prescribe conditions under which he would perform the duty after the work has been performed.

§ 157. When will failure of bailor to give notice, waive defects.—There can be no question but that the bailor having furnished the material from which the manufactured article is produced, is entitled to the material and the thing produced from it at all times. The title of the thing manufactured is in the owner of the material whether it conforms to the contract or not. And as has been held, "his retention of the articles manufactured is the exercise of an absolute right, and he is neither bound to inspect the articles nor to notify the other party of his objections."

But while the owner's title cannot be questioned the rule of good faith and fair dealing applies in this class of bailments to the bailor as well as to the bailee, and if he knows of defects or has objections he is bound to speak, and especially is this so if to remain silent would impose greater loss upon the bailee. Reasonable diligence is therefore required not alone of the bailee in a mutual benefit bailment, but is a duty incumbent as well upon the bailor. And so where the product manufactured from furnished material is returned in a condition not acceptable because not done in accordance with the contract or sample, and is therefore useless to the bailor, the bailor will not be permitted to retain the articles for an unreasonable time, negligently failing or refusing to report defects that he knows or by the due diligence might know exists, and because of such defects refuse compensation for the work performed.<sup>22</sup>

<sup>22</sup> Mack v. Snell, 140 N. Y. 193. So if cloth be delivered to a tailor to make a coat, and it is delivered to the owner when made, who accepts it, or retains and uses it for a long time, without any objection or claim of defective workmanship, he cannot be heard to claim, when sued for the price of the work, that it was not done according to agree-

ment, and it would not strengthen such a claim to call the workman's agreement to make the coat according to a certain style or pattern a warranty that survived acceptance. In such cases acceptance or omission to object within a reasonable time after delivery, or opportunity for examination, operates to extinguish all claims for breach of the contract.

§ 158. **Title to the material used by bailee passes to bailor by accession.**—This principle has already been partially discussed. It should be remembered that the thing delivered to the bailee, upon which the service is to be performed, is a bailment, the title to which is at all times in the bailor; and so any material used upon it, though furnished by the bailee, becomes a part of the thing and is absorbed by it, no matter if the materials are of greater value than the thing. This rule is important in cases where the thing is destroyed by unavoidable accident or irresistible force before its completion; for in such case, because of the rule of law of accession, the bailor is held liable to pay not only for the labor, but for the material; it is all the property of the bailor when it perishes, and none of it the property of the bailee.<sup>23</sup>

§ 159. **The lien of the bailee in "locatio operis faciendi" bailments.**—We have already discussed, in a general way, the subject of the lien of the bailee in certain cases,<sup>24</sup> but as applied to the subject here under consideration it seems to assume much greater importance. We know that the bailee who performs labor upon and adds material to the thing by way of repairs, as a general rule has a lien upon the repaired or newly-made chattel for his labor and materials, and that so long as he keeps the thing in his possession, asserting his lien and doing no act inconsistent with the lien, it will be good as against all the world.

This right of lien has been very much enlarged in later years. Originally at common law the right of lien was confined to cases where persons, by reason of their occupation, were under obligation to receive and care for and do labor on the personal property of others; such as common carriers, innkeepers, and the like. In more modern times the right has been materially extended, and now it may be laid down as a general rule to which there are but few exceptions, "that every bailee for hire, who by his labor and skill has imparted an additional benefit to the goods of another, has a lien upon the property for his reasonable charges in relation to it, and a right to retain it in his possession until these charges are paid. This includes all such mechanics,

See dissenting opinion, O'Brien, 115 N. Y. 316; *Mason v. Smith*, J., in *Mack v. Snell*, *supra*. Citing *Copeley Iron Co. v. Pope*, 108 N. Y. 232; *Brown v. Foster*, 108 N. Y. 387; *Streeter v. Brestine*, 130 N. Y. 474.

<sup>23</sup> *Gregory v. Stryker*, 2 Denio, 628; *Story, Bailments*, 423.

<sup>24</sup> *Ante*, § 64.

tradesmen and laborers as receive property for the purpose of repairing, cleansing, or otherwise improving its condition."

In *Wilson v. Martin*<sup>25</sup> the supreme court of New Hampshire illustrates this doctrine of lien: One had a lien upon some harness of the plaintiff for oiling and cleaning and labor bestowed, and plaintiff brought suit to recover them. The court held that he had a right to retain the possession and control of the harness until his charges in that behalf should be paid.

§ 160. **Priority of the lien.**—As to whether the bailee's lien obtained because of services, or, as is sometimes said, for betterments upon the property, has priority over other liens depends entirely upon the circumstances under which it was created. It is a general rule that the lien of the workman as against a prior recorded mortgage, or in some of the states a chattel mortgage on file, will not be held a prior lien without the consent or acquiescence of the mortgagee obtained prior to the performing of the labor except where the record lien is obtained during the performance of the work. There are, however, other circumstances that render a lien of the workman, obtained by reason of labor or repairs made upon the property while in the possession of the mortgagor and at his request, good even against the mortgagee of the property whose mortgage is recorded or filed as provided by law. These cases seem to be confined to repairs that are made necessary to preserve the property and make it useful. That is the case where the property, if the repairs were not made, would become useless. The rule is laid down and discussed in the case of *Scott et al. v. Delehunt et al.*<sup>26</sup> The action was brought to foreclose a lien upon a canal-boat against the owner and the mortgagee—the mortgagee defending. It appeared that the owner, who was running her as master, had taken her to the plaintiff's dry dock for repairs; that the boat had foundered and sunk, and unless the labor was put upon her would have been useless; that the mortgage of the defendant was given a long time prior to the time of making the repairs. The court say: "It must be taken as true that the owner was running this boat with the knowledge and consent of the mortgagees, and that the repairs were necessary to repair the damage which the boat had received, and to put her in condition for use. Under such circumstances I am of opinion that plaintiff's lien has priority

<sup>25</sup> 40 N. H. 88; The case of an hostler, Yelv. 67; Case v. Water-

house, 6 East, 523; 2 Kent's Com. (5th ed.) 653.

<sup>26</sup> 65 N. Y. 128; *ante*. § 75.

over defendants' mortgage. The mortgagees having allowed the owner to continue in the apparent ownership of the boat, making her a source of profit, and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the owner to do all that may be necessary to keep her in efficient state for that purpose. The boat having been damaged and rendered unfit for use, the owner did that which was obviously for the advantage of all parties interested; he put her into the hands of the plaintiffs to be repaired, and according to all ordinary usage they ought to have a right of lien on the boat, so that those who are interested in her, and who will be benefited by the repairs, should not be allowed to take her discharged of the lien. Looking to the rights and interests of the parties, generally, it cannot be doubted that it is much to the advantage of the mortgagee in such case that the mortgagor or owner should be held to have power to confer a right of lien on the boat for repairs necessary to keep her fit for navigation. Such is substantially the reasoning of Erle, C. J., in *Williams v. Allsup*.<sup>27</sup> I am unable to distinguish that case from this, and the reasoning of the learned judges who wrote opinions therein is quite satisfactory. I can perceive no distinction between the two cases, founded upon the facts that in that case the vessel was a steamboat, navigating the ocean or navigable waters connected therewith, while in this case the vessel was a canal boat. In each case the shipwright had possession of the vessel as security for repairs, made at the request of the mortgagor, or one standing in his place as the owner, and the same principles that would give them a superior lien in the one case would in the other."

It will be seen that the priority of the lien in such cases is based upon the element of necessity, or the securing of the property and making it useful to both the owner and the mortgagee; that by reason of the repairs upon the property there has been a substantial benefit to the mortgagee—a benefit to the extent of making it possible to recover the amount of his mortgage.<sup>28</sup>

<sup>27</sup> 10 C. B. (N. S.) 417.

<sup>28</sup> In the case of *Hammond v. Danielson*, 126 Mass. 294, a hack, described as in use at certain stables, was mortgaged, and, by the terms of the mortgage, the mortgagor was to retain possession and use and enjoy the same until default. While so in pos-

session, the mortgagor had it repaired. *Held*, that the person making the repairs had a lien therefor as against the mortgagee. Gray, C. J., delivering the opinion, said: A lien upon personal property cannot indeed be created without authority of the owner. *Hollingsworth v. Dow*, 19

§ 161. **Agisters and livery-stable men, no lien at common law.**—It is because of this principle of law that a common-law lien has by the great weight of authority been denied to agisters and livery-stable men. It is said that they are merely keepers of the animals intrusted to them, not imparting substantial benefit or betterment as does the workman who repairs the chattel. Nor are they under any obligation to take the animals into their care and keeping; no such obligation or duty resting upon them, as is imposed in case of innkeepers and common carriers.

The agister, or liveryman, is at liberty to do as he pleases as to taking the animals, and if he takes them may impose such terms and conditions as he chooses. He may demand his pay in advance, or may by contract create a lien upon the property for it.<sup>29</sup>

Pick. 228; *Globe Works v. Wright*, 106 Mass. 207. But in the present case such an authority must be implied from the facts agreed. The subject of the mortgage is a hack, that is to say, a carriage let for hire, described in the mortgage as "now in use" at certain stables; and which, as the parties have agreed in the case stated, the mortgagor retained possession of and used agreeably to the terms of the mortgage. It was the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security, affording a means of earning wherewithal to pay off the mortgage debt. The case is analogous to those in which courts of common law, as well as of admiralty, have held, upon general principles, independently of any provision of statute, that liens for repairs made by mechanics upon vessels in their

possession take precedence of prior mortgages. *Williams v. Allsup*, 10 C. B. (N. S.) 417; *The Scio*, L. R. 1 Adm. & Eccl. 353, 355; *The Granite State*, 1 Spr. 277; *Donnell v. The Starlight*, 103 Mass. 227, 233; *The St. Joseph*, 1 Brown, Adm. 202.

<sup>29</sup> *Cross v. Wilkins*, 43 N. H. 332. In *Millikin v. Jones*, 77 Ill. 372, the court below instructed the jury that "the plaintiff had no lien upon the cattle for pasturage; that the law does not give a lien on the stock for pasturage unless there is a special contract that the stock should be especially held for the pasturage." The supreme court held this to be correct. *Goodrich v. Willard et al.*, 7 Gray (Mass.), 183. The court say: "The sole question on these exceptions is whether an agister of cattle has a lien on them for their keeping. He has, by the law of Scotland (2 Bell, Com. 110); but the common-law authorities are uniform that he has not, except by special agreement with the owner. No such agreement appears in this case, and the rul-

In an early case in Vermont, *Cummings v. Harris*, the court giving its views for the reason of the rule says: "The usual cases in which the law creates a lien are, where the person performing services would have no other sure remedy: as a blacksmith shoeing a horse for a stranger; or a watchmaker cleaning a watch for a stranger; or an innkeeper furnishing entertainment for travelers; and, where the persons applying for their services are not strangers, the usage of their deal may be such that the law will create a lien. For instance, the course of their deal may be that payment for the services is always made before the prop-

erty at the trial must therefore be sustained. *Chapman v. Allan*, Cro. Car. 271; *Jackson v. Cummins*, 5 M. & W. 342; *Cross on Lien*, 25, 332; 2 *Saund. Pl. & Ev.* (2d ed.) 299; 1 *Dane, Abr.* 232; 2 *Kent, Com.* (6th ed.) 634, note; *Grinnell v. Cook*, 3 *Hill*, 491, 492; *Miller v. Marston*, 35 *Me.* 153. We notice in the editions of *Story on Bailments* which have been published since the author's decease, that this settled rule of law is put (we know not why) under a "query," in a note to section 443. It was not so in the editions published during his life." *Lewis v. Tyler*, 23 *Cal.* 364. In this case the court discusses the question of the reason for giving to the agister no common-law lien. The court say: "The general principle is, that where the law compels a person, such as an innkeeper or common carrier, to take the care and custody of goods, he shall have a lien upon the goods for his reasonable and just charges therefor; and the same rule applies to a person who, by his labor and skill, has imparted an additional value to the goods. *Grinnell v. Cook*, 3 *Hill*, 491. But one who merely provides food and takes the care of an animal, as an agister or livery-stable keeper, has no lien on the

property, unless there be a special agreement to that effect." *Bissell v. Pierce*, 28 *N. Y.* 252. The court held that "The law, in the absence of any special agreement, will not give to a farmer who pastures horses for hire, a lien upon the horses for the price of keeping them. The certificate of the town clerk in whose office a chattel mortgage is filed, stating that a paper is a copy of the original mortgage, is no proof of the existence of the mortgage. That must be produced and proved, or its non-production accounted for, so as to authorize secondary evidence. Nor is the certificate of the town clerk any evidence that the paper purporting to be a copy of the mortgage is a copy. The mortgage, and its contents, must be proved by common-law evidence." *McCoy v. Hock*, 37 *Iowa*, 436, held that under a contract for wintering cattle, stipulating that the expressed amount thereof shall be paid before moving the cattle from the agister's farm, he is entitled to retain them until paid the agreed amount. *Jones on Liens*, sec. 641; *Cross v. Wilkins*, 43 *N. H.* 332; *Wright v. Sherman*, 3 *S. Dak.* 290; *McGhee v. Edwards*, 87 *Tenn.* 506.

erty is taken away. But where the business is done under a personal contract the law implies no lien; but the parties may so form their contract as to create a lien, which the law will enforce."<sup>20</sup>

And in *Grinnell v. Cook*, Bronson, J., said in the opinion: "The right of lien has always been admitted where the party was bound by law to receive the goods; and in modern times the right has been extended so far that it may now be laid down as a general rule, that every bailee for hire who by his labor and skill has imparted an additional value to the goods has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen and laborers as receive property for the purpose of repairing, or otherwise improving its condition. But the rule does not extend to a livery-stable keeper, for the reason that he only keeps the horse, without imparting any new value to the animal. And besides, he does not come within the policy of the law, which gives the lien for the benefit of trade. Upon the same reasons the agister or farmer who pastures the horses or cattle of another has no lien for their keeping, unless there be a special agreement to that effect."<sup>21</sup>

The supreme court of Pennsylvania has not indorsed this doctrine, but in the face of the great weight of authority has held that the agister has a common-law lien upon the animals for their keep. They have followed the reasoning of Chief Justice Gibson in *Steinman v. Wilkins*,<sup>22</sup> an early case, and one who reads it cannot help but recognize that it is well reasoned if it has not been generally followed. He says: "From the case of a chattel bailed to acquire additional value by the labor or skill of an artisan, the doctrine of specific lien has been extended to almost every case in which the thing has been improved by the agency of the bailee. Yet, in the recent case of *Jackson v. Cummings* (5 Mees. & Welsb. 342), it was held to extend no further than to cases in which the bailee has directly conferred additional value by labor or skill, or indirectly by the instrumentality of an agent under his control; in supposed accordance with which it was ruled that the agistment of cattle gives no lien. But it is difficult to find an argument for the position that a man who fits an ox for the shambles, by fattening it

<sup>20</sup> *Cummings v. Harris*, 3 Vt. 244.

<sup>21</sup> *Grinnell v. Cook*, 3 Hill (N. Y.), 485, 38 Am. Dec. 206.

<sup>22</sup> 7 Watts & Serg. 466.

with his provender, does not increase its intrinsic value by means exclusively within his control. There are certainly cases of a different stamp, particularly *Bevan v. Waters* (Mood. & Malk. 235), in which a trainer was allowed to retain for fitting a race-horse for the turf. In *Jackson v. Cummings* we see the expiring embers of the primitive notion that the basis of the lien is intrinsic improvement of the thing by mechanical means; but if we get away from it all, what matters it how the additional value has been imparted, or whether it has been attended with an alteration in the condition of the thing? It may be said that the condition of a fat ox is not a permanent one; but neither is the increased value of a mare in foal permanent; yet in *Searfe v. Morgan* (4 Mees. & Welsb. 270), the owner of a stallion was allowed to have a lien for the price of the leap. The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and convenience of the world. Before *Chase v. Westmore* (5 Maule & Selw. 180), there was no lien even for work done under a special agreement; now, it is indifferent whether the price has been fixed or not. In that case, Lord Ellenborough, alluding to the old decisions, said that if they 'are not supported by law and reason, the convenience of mankind certainly requires that our decisions should not be governed by them;' and Chief Justice Best declared in *Jacobs v. Latour* (5 Bingh. 132), that the doctrine of lien is so just between debtor and creditor that it cannot be too much favored. In *Kirkham v. Shawcross* (6 T. R. 17), Lord Kenyon said it had been the wish of the courts, in all cases and at all times, to carry the lien of the common law as far as possible; and that Lord Mansfield also thought that justice required it, though he submitted when rigid rules of law were against it."

The Pennsylvania court has followed this doctrine to the present time. In the case of *Yearsely v. Gray*,<sup>22</sup> decided in Feb-

<sup>22</sup> 140 Pa. St. 238. In the last case cited the court says: "It is a well-settled rule of law that an agister is not bound to restore a horse which he has taken to pasture until his compensation is paid or tendered. *Megee v. Belrne*, 39 Pa. St. 50; *Mathias v. Sellers*,

86 Pa. St. 486. This is because the agister has a common-law lien for its keep. And it is equally well settled that, where there is an entire contract for the keep of a number of horses or other animals, the agister has a lien on them all, not only for their pro-



ruary, 1891, many interesting cases will be found cited in the opinion and in the brief of counsel for the appellee.

§ 162. **Lien by statute.**—In most of the states this whole question is regulated by statutes giving to the agister, the liveryman, the farmer, the ranchman, and those who keep and care for cattle, sheep, horses and other animals, a lien upon the animals so kept and cared for, for their keep.

§ 163. **Chattel mortgage takes precedence over lien.**—The question as to whether a chattel mortgage which is duly filed or recorded as required by the statute shall take precedence over the lien of an agister created by statute has been before the courts in several cases. This presents a very different case from the one discussed in the preceding sections. There the question was one of benefit and betterment to the subject of the bailment, and often one of necessity; here that question is not involved, and so the weight of authority is that a chattel mortgage which has been properly executed, filed or recorded as the law requires will take precedence over the lien of the agister. It is based upon the principle that the mortgage, having been executed and properly filed, becomes a public record, and the law presumes that every one has notice of its existence and of the lien it creates; that therefore the agister had notice of the existence of this lien before he devoted the care and furnished the supply of feed to the animals bailed to him.

In a South Dakota case <sup>34</sup> the mortgage was duly executed and filed in the office of the register of deeds of the proper county as required by the statute. Subsequent to that time the mort-

portionate part of the sum due for the keep of all, but for the entire amount due upon all the animals embraced in the contract. *Young v. Kimball*, 23 Pa. St. 193; *Hensel v. Noble*, 95 Pa. St. 345. In this case the defendant had taken a number of plaintiffs' horses and cows to pasture, for a compensation agreed upon. The plaintiffs attempted to take away one of the horses without paying or offering to pay for its keep. The defendant denied their right to do so, and the plaintiffs brought replevin for the horse. Their contention was that the animals that were

left were more than adequate to secure the unpaid bill. This may be so, but the defendant had a right to all the security in his hands, and this right could not be taken from him at the will of the plaintiffs. If, in the opinion of the latter, the defendant had more security than was necessary, the obvious remedy was to pay for their cattle and take them away. We know of no case in which a debtor can require his creditor to give up a portion of his security without payment of the debt."

<sup>34</sup> *Wright v. Sherman*, 17 L. R.

gagor, being in possession of the stock, left them with the defendant to be fed and taken care of. The defendant kept and fed the stock without any knowledge on the part of the plaintiff, the mortgagee, and received no pay. Therefore, when the action was brought by the plaintiff to get possession of the stock under his mortgage, the question of priority between the two liens was presented. The court say: "When defendant took this stock to pasture he took it knowing (for the filing of the mortgage notified him) that plaintiff had a mortgage upon it to secure an indebtedness not yet due. He knew that such mortgage constituted an existing lien upon such stock at the time he took it to pasture. (Citing statute.) He knew that plaintiff had a right, whenever he might choose to do so, to take possession of the stock, for the mortgage, of which he had notice, so provided. He knew, for the said section 4358 so declares, that no person whose interest is subject to the lien of the mortgage may do any act which will substantially impair the mortgagee's security; he knew that to just the extent that another charge was put upon the property prior to plaintiff's mortgage, his security would be impaired. He knew that under the law and terms of the mortgage the mortgagors were entitled to the possession of the stock, and that in reason and according to custom the mortgagors so in possession would be expected to care for and feed them. For the purpose of determining his right in this matter he knew all these facts as well as though he had been personally and actually informed of them at the very time he took the stock."

In the case of *Chapman v. First Nat. Bank*,<sup>35</sup> the question arose as to whether a lien created by statute in favor of livery-stable keepers for the keeping and feeding of stock should have precedence over a mortgage on the animals previously given by their owner; and in that case it was held that "A statute giving livery-stable keepers a lien for the keeping of animals placed in their charge without the knowledge or consent of the mortgagee does not make such lien superior to that of a prior duly-recorded mortgage on the animals, even though the law-day has passed and the animals are still in the mortgagor's possession." In this case there is a large number of cases cited both in briefs and in the opinion of the court.

A. 792; *Johnson v. Hill*, 3 Stark. Hill (N. Y.), 485; *Bissell v. Pierce*,  
172; *Broadwood v. Granasa*, 10 28 N. Y. 252.  
Exch. 417; *Grinnell v. Cook*, 3 <sup>35</sup> 98 Ala. 528, 22 L. R. A. 78.

## CHAPTER XI.

### LOCATIO CUSTODIÆ.

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| § 207. Unauthorized use of chattels.<br>208. Delivery, misdelivery, non-delivery.<br>209. Confusion of goods.<br>210. Criminal liability. | § 211. Termination.<br>212. Conversion.<br>213. Compensation—Lien.<br>214. Action against the warehouseman. |
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### § 164. The letting of care and custody of the thing for hire.

This is one of the mutual-benefit bailments, or more particularly speaking, one of the "hiring" or "*locatio*" bailments, and the general rule governing liability, where the bailment is for the benefit of both parties, obtains. The bailor and bailee are held to ordinary diligence and are liable for ordinary negligence.

§ 165. **What this subdivision embraces.**—It would be difficult to mention and discuss all of the different kinds of bailments embraced in this classification; attention can only be directed to some of the more important subdivisions.

For convenience in considering it, the subject of custody bailments is divided into four general heads.

*First:* Warehouses and warehousemen; which include storage-houses and storagehouse keepers, elevators and elevator men, and common carriers when holding property in storage.

*Second:* Wharfingers, and under certain circumstances factors and commission merchants.

*Third:* Safe deposit vaults and trust companies, banks and bank deposit vaults.

*Fourth:* Other custodians.

§ 166. **Depositum.**—While a *depositum*, a mere naked bailment, belongs to a class of custody bailments, it is a gratuitous undertaking, and has already been discussed.<sup>1</sup> It does not belong to the class of bailments under consideration, the *locatio* or the hiring bailments, as they are classified with the mutual benefit bailments, or bailments for hire.

#### *First.*

§ 167. **Warehouseman.**—A warehouseman is a person other than the owner who receives goods and merchandise to be stored in his warehouse for hire.<sup>2</sup> From this definition it may be seen

<sup>1</sup> *Ante*, § 86.

v. Jagode, 195 Pa. St. 163; Sny-

<sup>2</sup> Bouvier, Law Dict.; Bucher v. Com., 103 Pa. St. 528; Moorse

dacker v. Blatchley, 177 Ill. 506.

that this comprises a large and important class of business: those who follow the business of furnishing storage of chattels for hire, such as the storing of grain or furniture or freight, as, for example, the common carriers who furnish storage for freight that is often left beyond the limit of time for which they are liable as common carriers; the proprietors of flouring mills who store grain for their customers, and others who, directly or indirectly, become custodians of property and receive compensation therefor.

In *Owen v. Boyle*<sup>2</sup> the court in its opinion used this language: "The building or apartment where the salt was stored was used and appropriated by the occupant not for the deposit and safe-keeping or selling of his own goods, but for the purpose of storing the goods of others placed there in the regular course of commercial dealing and trade, to be again removed or re-shipped, and the building or apartment had acquired the character of a warehouse."

The court in the case of *Reg. v. Hill*,<sup>3</sup> an English case, defined a warehouse to be a place where one stores or keeps goods which are not immediately wanted for sale.

§ 168. **Public warehouses.**—In some of the states statutes have been enacted making certain warehouses public warehouses, putting upon them a requirement analogous to the requirement of innkeepers and carriers, namely, that they shall receive and care for the property presented for storage, subject, of course, to the limitation that it is fit for storage, and that the price must be

<sup>2</sup> 22 Me. 47. The business of maintaining stock-yards for the reception of cattle belonging to others than the proprietors of the yards has been held to be analogous to the business of warehousemen. *Del., L. & W. R. Co. v. Central Stock Yard T. Co.*, 19 Atl. 185 (N. J.).

<sup>3</sup> 2 M. & Rob. 458. The prisoners were indicted under the statute for breaking and entering a warehouse. It appeared that the prosecutor occupied a shop; in a cellar under the shop he kept such goods as he had on hand at the time of the auction to expose for sale in

his shop, and the goods stolen were in that cellar. There was no inner communication between the house and the cellar, but the cellar was entered by a stairway from the street. It was objected for the prisoner that such cellar was not a warehouse under the statute. Rolfe, B., said: "A warehouse in common parlance meant a place where a man stored or kept his goods which were not immediately wanted for sale, and there was no reason to suppose that the legislature used the term in this statute in a sense repugnant to its ordinary meaning."

either paid or tendered if demanded. This, however, except by statute is not the law; warehouses as a rule are private and controlled by their owners. The reason for the statutes controlling warehouses is quite fully set forth in the opinion of the court in the case of *Nash v. Page*.<sup>5</sup> The court say: "When he undertakes . . . to conduct the business as a public warehouseman, he assumes an obligation to serve the entire public, and has no right to select his bidders or to refuse to receive the tobacco of the producer when shipped to him. This obligation exists not only by reason of the statute, but under the rule of common law. We perceive no difference between this character of warehouses and that of wine warehouse or grain warehouses, and the rule applied to the latter required them to discharge the duty of receiving the wine and grain shipped to them by the owner. This is the first time in the history of the state that warehousemen controlled and regulated in their business by legislation have asserted their right to select their customers, including both the producer and the buyer."

In some of the courts it has been held that warehouses which receive grain and commodities that are alike and mix them, issuing receipts for the same, selling and shipping from the common mass, are public warehouses. But generally these opinions have been founded upon the statutes of the particular states. The constitution of the state of Illinois, article XIII, title Warehouses, defines in the following language public warehouses: "All elevators or storehouses where grain or other property is stored for compensation, whether the property stored be kept separate or not, are declared to be public warehouses."<sup>6</sup> It may, however, be generally said that where there is no statute or constitutional provision which requires certain warehouses to be public warehouses, a warehouseman is not required by any general rule of law to receive goods for storage against his will, but that the relation of warehouseman grows out of the contract relation of bailor and bailee, and is not analogous to an innkeeper or common carrier.<sup>7</sup>

§ 169. **Bonded warehouses.**—Bonded warehouses are warehouses that are designated by the secretary of the treasury of the United States in which are to be stored merchandise im-

<sup>5</sup> 80 Ky. 539.

<sup>6</sup> *National Bank v. Langdon*, 28 Ill. App. 401.

<sup>7</sup> *Delaware, etc. R. Co. v. Central Stock Yards Co.*, 45 N. J. Eq. 50.

ported into the United States until such time as the customs duty shall be paid. Such warehouses are usually private, and are in the custody and control of the owners and some customs officer designated to act for the United States. The government, however, assumes no responsibility for the safe-keeping of the merchandise, stored in them, and merchandise so deposited may be withdrawn at any time within one year upon the payment of the duties and charges; and after one year until the expiration of three years on payment of the duty and charges and ten per centum per annum in addition.<sup>8</sup>

While the United States does not assume any responsibility for the safe-keeping of the merchandise, the owner of the warehouse is under the same obligation and liability as any other warehouseman, and is answerable to the owner of the goods to the extent of such liability.<sup>9</sup>

In *Macklin v. Fraser*<sup>10</sup> the court say: "Without referring in detail to the laws of congress regulating the rights, duties and powers of the keepers of bonded warehouses, we hold that the appointment by the internal revenue department of store-keepers who are invested with the joint custody, with the warehousemen, of the warehouses and the goods stored therein, does not lessen in any degree the diligence which the latter as bailees for hire are by the general laws required to exercise to prevent fire from being communicated to their houses or to the goods in their custody. The right of the storekeeper to ingress into the warehouse for the discharge of certain duties imposed upon him by law does not exonerate the warehouseman from the use of at least ordinary diligence in preventing the goods stored therein from being damaged or destroyed by the recklessness or carelessness of that officer."

§ 170. All warehouses public or quasi public.—The states generally have enacted statutes regulating the warehouse business, and in many, if not most of the states, warehouses are made public agencies to be controlled by the laws of the state, somewhat as the law controls innkeepers and common carriers, making it incumbent upon them to receive all grain or produce or property in

<sup>8</sup> U. S. R. S., §§ 2954-3008.

*Fairfax v. Central R. Co.*, 67 N. Y.

<sup>9</sup> *Clafin v. Myer*, 75 N. Y. 260; 11.

<sup>10</sup> 9 Bush (Ky.), 3.

their line fit to be stored, on payment of the price for storage, regulating the conduct of the business, fixing the price to a certain extent and determining the duties and liabilities of the proprietors.<sup>11</sup>

These statutes have been held by the courts both state and federal to be constitutional, for the reason among other things, that the warehousemen engaged in the enterprise of receiving, storing, loading and shipping the immense products of the country, especially of the west and northwest, which furnishes the east, and contributes very largely to foreign markets, are engaged in a public business, and the interests of the public demand that they should be regulated by law. It has been frequently held that "whenever a person pursues a public calling, and sustains relations to the public that the people must of necessity deal with him, and are under a moral duress to submit to his terms if he is unrestricted by law, then in order to prevent extortion and an abuse of his position, the price he may charge for his services may be regulated by law," and as well may his duties, if a warehouseman, as to receiving, caring for and discharging goods and chattels, and his other relations to the public in that business be the subject of statutory enactment.<sup>12</sup>

Although the ownership of the property may be private, in a strict legal sense the use is public; hence the expressions so fre-

<sup>11</sup> *Brass v. Stoesner*, 153 U. S. 391; *Munn v. Illinois*, 94 U. S. 113. This case has been very generally followed. Chief Justice Waite delivered the opinion of the court. After calling attention to the immense grain trade of the west and northwest taken care of in the city of Chicago, where grain is taken from cars and boats through the great elevators of the warehousemen, stored and cared for, and reloaded and reshipped for the markets selected, the court say: "Thus it is apparent that all the elevating facilities through which these vast productions of seven or eight great states of the west must pass on the way to four or five of the states on

the seashore may be a virtual monopoly.

"Under such circumstances it is difficult to see why, if the common carrier or the innkeeper . . . are pursuing a public employment and exercising a sort of public office, those plaintiffs do not. They stand at the very gateways of commerce and take toll from all who pass. Their business most certainly tends to a common charge, and is because a thing of public interest and use . . . Certainly if any business can be clothed with a public interest and cease to be *juris privati* only, this has been done."

<sup>12</sup> *Ogden v. Saunders*, 12 Wheat. 259.



quently used, "public wharves" "public houses" "public warehouses." <sup>13</sup>

But whether regulated by statute to an extent that they are made public or not, we cannot escape the conclusion that a warehouse carrying on a general business, in receiving, storing, inspecting and shipping large quantities of produce for a considerable portion of country is engaged in a *quasi-public* business.

§ 171. **Delivery—To create liability.**—The liability of the warehouseman can only be created by a delivery of the property for storage that is to be stored and cared for. And so it is necessary that the property should come fully into the possession of the warehouseman so that it may be fully under his control, or the control of his servant or agent as bailee and custodian. It is not really necessary that the property should be stored in the warehouse in order that the liability of the warehouseman should attach. Where the property has been received upon his premises, and is under his control, having been delivered to him expressly or by implication, so that it may be said that it has passed from the possession and control of the owner and bailor into the possession and control of the warehouseman, he is liable as a warehouseman; and where the warehouseman has consented to take charge of the goods before they reached his warehouse, he has been held liable from that moment.<sup>14</sup>

It therefore goes without saying, if there has been no delivery of the property and no acceptance, either actual or constructive, there would be no liability as warehouseman.

§ 172. **A sale or a bailment.**—In determining whether the transaction is a bailment of the goods for custody, or constitutes a sale of the property, the court must discover from the agreement and undertaking of the parties their real intention. If by the contract express or implied the title of the property is transferred to the warehouseman, it is a sale; but if the expressed or implied intention of the parties is to transfer the possession merely, which is to be returned, either in kind or the product thereof to the bailor, it is a bailment.

<sup>13</sup> *Olcott v. Supervisors*, 16 Wall. 678; *Hannah v. People*, 198 Ill. 77; *Central Elevator v. People*, 174 Ill. 203.

<sup>14</sup> *Ducker v. Barnett*, 5 Mo. 97;

*Story on Bailm.* (9th ed.), § 445; *Merritt v. Old Colony R. Co.*, 11 Allen (Mass.), 80; *Rogers v. Stophel*, 82 Pa. St. 111; *Farrell v. Richmond R. Co.*, 102 N. C. 390.

In determining this question when involved in custody contracts the adjudicated cases may be divided into three distinct classes.

(1) When by the contract the intention is clearly expressed or implied that the title of the property is to pass, it is a sale.  
(2) Where the property is taken to be kept and the market price paid or the property returned at the option of the warehouseman, it is a sale, but (3) where the property is deposited with and accepted by the warehouseman the market price to be paid or the property returned at the option of the owner, it is generally held to be a bailment.<sup>15</sup>

A general discussion of this subject in cases of ordinary bailments has already been had.<sup>16</sup>

§ 173. **The warehouse receipt.**—On receipt of the property the warehouseman, or bailee, usually in due course of business delivers to the bailor, the owner of the property, a receipt for the same. There is no particular form of receipt required; usually it contains the date the property is received, with a description of the property, from whom received, and an agreement to redeliver the property on demand to the bailor or his order.

It is not unusual for an elevator receipt to contain an agreement, in connection with the receipt, providing as to how the

<sup>15</sup> In the following cases held a sale: *Woodward v. Seamans*, 135 Ind. 330, 21 Am. St. Rep. 225; *Ives v. Hartley*, 51 Ill. 520. And where the plaintiff knew it to be the established custom of the warehouseman to mix all grain received and sell it out, whether purchased or received for store, delivered his grain to the elevator without any agreement that it should be held and stored, the transaction was held to be a sale and not a bailment. *Thompson v. Jordan*, 164 Ind. 551, 73 N. E. 1087. If at option of warehouseman he may redeliver the grain or pay the market price—a sale. *Johnston v. Brown*, 37 Iowa, 200; *Odell v. Lyda*, 46 Ohio St. 244; In *Nelson v. Brown*, 44 Iowa, 455,

the court held that a contract acknowledging the receipt of grain for storage, "loss by fire and the elements at the owner's risk," with the option to the party receipting it to return grain of equal test and value, constitutes a contract of bailment, which is converted into a sale whenever the bailee disposed of the grain. *Nelson v. Brown*, 44 Iowa, 455. And in the following cases a bailment: *Well v. Krejnick*, 63 Minn. 314; *Miller v. State*, 144 Ind. 401; *Irons v. Kentner*, 51 Iowa, 88, 33 Am. 119. Where the deposit is at the option of the depositor. *James v. Plank*, 48 Ohio St. 255; *Lyon v. Lennon*, 106 Ind. 567.

<sup>16</sup> *Ante*, § 22.

property shall be kept and the amount to be charged, and often putting upon the property a lien for the payment of money. In many of the states the receipt to be given is regulated by statute, and often the statutes require certain formalities; the courts have often been called upon to determine what shall be deemed a proper receipt.

"A warehouse receipt need not be in any particular form. An instrument intended simply as a memorandum of the amount on storage, if signed by the warehouseman, has an assignable quality, and an indorsement and delivery of it to one who makes advances upon the faith of it renders the warehouseman liable to the holder of it for the goods it represents."<sup>17</sup> And in *Harris v. Bradley*, the court held that an instrument executed and signed by warehousemen, in the following words, "Received in store for account of B. & W. 3,000 sacks of corn" is a warehouse receipt, having an assignable or negotiable value.<sup>18</sup>

It has been held by some of the courts that where the receipt was given by one who is not a warehouseman it will not be held to be good in the hands of an assignee as against the creditors of the owner. In the case of *Geilfuss v. Corrigan et al.*,<sup>19</sup> the supreme court of Wisconsin so held. In that case storage receipts were issued by a debtor to its creditors on a quantity of pig iron held in its yards for the purpose of allowing its creditor to raise money upon the receipts as collateral. The iron was not placed in the hands of a regular warehouseman for the reason that it would be, as the evidence shows, less expensive for the company, debtor, to issue the receipts itself. The receipts were issued and assigned, and afterwards the property was levied upon by a creditor. The court held that the transaction could not be a pledge of the property for the reason that it was not in the possession of the pledgee; that it was not a chattel mortgage for the reason that there was no sale with a defeasance clause. The court say: "*Bona fides* does not avail the pledgee in the absence of delivery and possession either actual or constructive. There was confessedly no actual delivery here, and the only thing that can be claimed to be a symbolical or constructive delivery is the indorsement and delivery of the false

<sup>17</sup> Jones on Pledges, sec. 298.

<sup>19</sup> 95 Wis. 651, 70 N. W. 306.

<sup>18</sup> *Harris v. Bradley*, 2 Dill. (U. S.) 284.

receipts; hence the question becomes whether a delivery of the receipts under the circumstances is a constructive delivery of so much iron. Had they been in fact warehouse receipts, the transfer and indorsement thereof by way of pledge would have operated as a sufficient constructive delivery of the property both by the common law and by the statute.

"Bills of lading and railroad receipts are by statute placed upon the same footing. The reasons for this rule are very apparent. In such cases the property itself is in the hands of a third person or corporation instead of in the possession of the vendor or pledgor. Consequently it does not furnish any false basis of credit, nor is any creditor deceived, because it is well understood that goods in the hands of warehousemen or carriers are or may be the property of others, and by the long usage of trade subject to just this mode of transfer. No such considerations, however, apply in the case of goods in the possession of the vendor or pledgor, or in some third person who is not a warehouseman or wharfinger, and we know of no rule which makes the mere delivery of a receipt a constructive delivery of the property in pledge in such a case."

In *Shepardson v. Cary* <sup>20</sup> the court say: "To uphold the receipt as a proper warehouse document transferring the title to the property, and operating as a good constructive delivery of it to the vendee, it must in all cases distinctly appear that it was executed by a warehouseman, one openly engaged in that business and in the usual course of trade." If, however, it should appear that the goods were placed in the possession of a third person as custodian by the bailor, and an order given upon the custodian of the goods directing him to hold the property for the pledgee, and this is brought home to the knowledge of the custodian, in such case the courts have held that it would be a sufficient delivery and change of possession of the property, and this for the reason that the property is placed beyond the control of the pledgor or vendor.

In the case of *Sinsheimer et al. v. Whitely* <sup>21</sup> the court held that the receipt given was not a warehouse receipt; "that where

<sup>20</sup> 29 Wis. 34-42; *Whitaker v. Sumner*, 20 Pick. 399; *Tuxworth v. Moore*, 9 Pick. 347. *Lowrie's Executrix v. Salz*, 75 Cal. 349. "A receipt by A. B. & Co., in form: 'Received on storage in

<sup>21</sup> 111 Cal. 378, 43 Pac. 1109; my canning house, from E. B. M.

produce is left with the weigher, who stores it without charge, a receipt given by the weigher, merely reciting that the produce had been weighed, and stating its weight, is not a warehouse receipt, the transfer of which as security constitutes a delivery of the produce, rendering the pledge valid as against attaching creditors of the pledgor."

From this discussion of what is not a receipt can be understood what is required in a valid receipt.

§ 174. At common law a warehouse receipt, in a technical sense, is not negotiable.—The customs of trade and business dealings have established for the warehouse receipt, when properly indorsed, a certain kind of negotiability which by the courts has been termed "*quasi-negotiability*," a negotiability not known to the law merchant or of equal rank with negotiable instruments, but rather a medium of securing a transfer of title to the property or pledging it as security. It is used by way of security for borrowed money; is often transferred by indorsement; is apparently sold in the market as though it were a negotiable instrument; but it cannot be said that it is, in a technical sense, negotiable. It does not stand for the amount of money that it represents upon its face, but merely stands in place of the property it represents, and the delivery of it has the

& Co., seventeen hundred and twenty cases of 3x tomatoes, my own packing. Deliverable to order of E. B. M. & Co., only on production of this receipt properly indorsed,' was held not a 'warehouse or storage' receipt, within Maryland Acts 1876, ch. 262, punishing the unlawful delivery by unauthorized persons of goods mentioned in such receipts. *State v. Bryant*, 63 Md. 66. A receipt for a quantity of petroleum, given to the owner by the superintendent of his factory, where a larger quantity was stored, no oil being set apart as covered by the receipt, which was subsequently transferred by the owner, by indorsement, as collateral security

for a loan, was held not a warehouse receipt within the meaning of the New York statute (Laws 1858, ch. 326), providing that any person to whom warehouse receipts are transferred by indorsement shall be deemed the owner so far as to give validity to any pledge, lien or transfer by such person. *Yenni v. McNamee*, 45 N. Y. 614. A weighmaster's ticket, with the word 'stored' written on its face, is not a warehouseman's receipt entitling the holder to recover thereon, under Iowa Code, sec. 2171, regardless of the disposal of the grain covered thereby. *Cathcart v. Snow*, 64 Iowa, 584."

same effect as the delivery of the property itself. The delivery of the receipt does not transfer the contract so as to enable the assignee or indorsee to maintain an action upon it in his own name without the aid of a statute governing such actions. It cannot be said that there is any privity of contract between a warehouseman and the assignee of the warehouse receipt; and so it follows that the assignee of the warehouse receipt occupies no better position in relation to the warehouseman than did the bailor of the property, for it has been frequently held that the assignor could convey no greater title to the property than he himself possessed. It is therefore not, in a technical sense, like a bill of exchange or a negotiable instrument, but it is more in the nature of an assignment of the rights and interests of the bailor in the property represented by the warehouse receipt.

In the case of *Burton v. Curyea*,<sup>22</sup> the court, among other things, charged the jury as follows: "The warehouse receipts are not negotiable in a legal sense so as to enable the person holding them to transfer a greater right or title to the property mentioned in them than he himself had. Their only office is to stand in the place of the property itself, so far as the questions involved in this case are concerned, for the convenience of the parties interested in the property. The delivery of the receipt has the same effect as the delivery of the property; no greater and no less."

It is urged that warehouse receipts should be treated as negotiable paper, and that this is required by the exigencies of commerce. Referring to this position, and the reasons urged in its support, we can only say, if it be desirable that these instruments should be placed upon this footing, it belongs to the legislature to make the rule. Such is certainly not now the law as it has been expounded by the highest authorities both of Eng-

<sup>22</sup> 40 Ill. 320; *Western Union R. Co. v. Wagner*, 65 Ill. 197. A *bona fide* holder for value of a warehouse receipt, issued to himself by the president for cotton, may recover the value of the cotton from the warehouse company, although no cotton was in fact deposited, if the president had au-

thority to issue such receipt. *Corn Ex. Bank v. Am. Dock & T. Co.*, 14 App. Div. 452, 43 N. Y. Supp. 1028. The indorsement and delivery of a warehouse receipt of goods stored transfers the ownership of the property only, and not the contract itself.

land and of this country. It is true that it is one of the excellencies of the common law that its principles can be adapted by the courts to new emergencies as they arise in the rapid development of modern society; but this flexibility of the system in judicial hands should be confined to the new application of settled principles, or of principles in harmony with those that are settled, and should not be extended to the making of new rules that are merely in violation of maxims lying at the foundation of our laws and as old as the law itself.

This question was thoroughly discussed in the case of *Second National Bank v. Walbridge*.<sup>23</sup> That case was a peculiar one. The warehouseman, on the application of the owner, by a mistake issued to him at different dates two warehouse receipts for the same property. Afterward, the assignee of the first receipt recovered the property in replevin from the plaintiff, who held the second receipt. The plaintiff thereupon instituted a suit to recover from the defendant, the warehouseman, the value of the property.

The supreme court held that the assignee of the receipt occupied no better position than the bailor of the goods would have occupied had he brought the action. Counsel for the plaintiff in the argument urged that the case at bar was identical in principle with cases where a teller or other officer of a bank certified checks to be good, and, thus certified, the checks had been transferred to third parties, when in truth the drawer had no funds in the bank; and also cited cases embracing the principle involved, where a note is given which would be void in the hands of the original holder, but in the hands of a *bona fide* indorsee would be good; so that in this case the negotiability of the warehouse receipt was squarely before the court. The court say: "A warehouse receipt given by a warehouseman for property placed in his possession for storage is not, in a technical sense, like a bill of exchange, a negotiable instrument; but it merely stands in place of the property it represents; and a delivery of the receipt has the same effect in transferring the title to the property as the delivery of the property." And further added: "Nor is there any force in the claim made in the argument, that the receipt in this case was negotiable because, by its terms, the prop-

<sup>23</sup> 19 Ohio St. 419. See case distinguished in *Ensel v. Levy & Bro.*, 46 Ohio St. 255-263.

erty was declared to be subject to the order of the bailor, . . . and such was the fact in all of the cases above cited.

"This case is clearly distinguishable from the cases urged upon our attention, where negotiable paper, invalid between the original parties, has been enforced in favor of a *bona fide* holder for value; also, from the cases where the representation of the defendant has been made directly to the plaintiff, with the view of influencing his conduct.


"In the former class of cases, the negotiable character of the paper affords the holder protection; in the latter class, when the other necessary elements are found, there exists good ground for the application of the doctrine of estoppel."

It seems, therefore, that the law places warehouse receipts, when indorsed or transferred as security for money loaned, upon precisely the same footing as loans made upon pledge and delivery of the property itself. If the person who pledges the property is the owner, then the security is good to the extent of the value of the property in custody of the warehouseman and shown by the receipt; but if he is not the owner, if he is simply a bailee, or if the warehouse receipt had been issued to him by mistake, or if the property turns out to be a different kind of property than that represented in the receipt, and it could not have been known to have been thus different by the warehouseman without opening up the packages and examining each package, or if the property should turn out to be stolen property, or if the bailor of the property should not be the owner, but simply a bailee, and was attempting to make a fraudulent use of the property intrusted to his keeping, in such like cases it seems to be settled that a person purchasing or receiving the property as security will receive no better title than the indorser or warehouseman's bailor had. In other words, the property will be subordinated to the title of the true owner; and in the language of the court in *Burton v. Curyea*,<sup>24</sup> "these are risks which men engaged in business must be content to encounter, and against which the law can afford them no protection. The law can punish roguery but it cannot secure innocent persons against losses from its multiform devices."

<sup>24</sup> 40 Ill. 320; Jones on Pledges, sec. 281; Davis v. Bradley, 28 Vt. 118; Bryans v. Nix, 4 M. & W. 775; Broadwell v. Howard, 77 Ill. 305.



In the case of *Dean v. Driggs*,<sup>25</sup> a warehouseman issued two receipts substantially in the following language:

		"M. S. Driggs & Company's Warehouse.	
		"New York, March 28, 1885."	
No. 1394.			
Marked			
Negotiable.		Duly paid.	
1.500 Bbls.			
		Received from Max Von Angern, ex Grinaldo, in store 278-80 South street, to be held by us on storage, and to be delivered to his order on return of this receipt and payment of storage and charges, fifteen hundred barrels Portland cement.	
		"Storage per month 4.	
		"Labor.	
		"M. S. Driggs & Co."	

The bailor of the property, having obtained the receipts, took them to the plaintiffs and executed a note for \$3,500, and indorsed the warehouse receipts, and authorized the plaintiffs to deliver the note and the guaranty of payment indorsed upon it by the plaintiffs, at his request, together with the warehouse receipts as collateral security, to a certain bank in New York, and to receive the proceeds of the discount of such note. The plaintiffs did so, and delivered the money to the bailor; the note not being paid when due, the plaintiffs paid it. The bailor having absconded, the plaintiffs went to the warehouse of the defendants, and when the barrels which were purported to be filled with Portland cement were opened, it was discovered that they did not contain Portland cement, but contained a practically worthless material somewhat resembling clay or mortar.

Upon this the plaintiffs commenced a suit against the defendants, the warehousemen, claiming that they were liable for the cement the barrels were represented to contain; and the question then arose as to the obligation of the warehouseman to examine packages that are left with him for safe keeping. The court held "that the language of the receipt was merely descriptive of the barrels which the defendant received, that it would not be practicable for a warehouseman to be compelled to open and examine the contents of every package, barrel or box of merchandise delivered to him where it is so packed as to cover and con-

veal the real nature of the goods delivered;" and adding, "that in some instances, if such were the law, it would be necessary for the warehouseman to have expert examiners in order to ascertain the kind of goods contained in such packages;" the court using this language: "It is known and understood that the business of a warehouseman is not that of an inspector of property delivered to him, nor is he an insurer of the contents of packages. It is no part of the duty of the defendant, as a warehouseman, to have property inspected or its quality warranted, and no proceedings are supposed to take place to enable a warehouseman to become acquainted with the contents of packages, for the very reason that in his business it is unimportant what such contents are.

"The general object of giving a description of the property in the receipt is for the purpose of identification only, so that the identical property delivered to the warehouseman may be delivered back by him upon the return of the warehouse receipt, and for such purpose it is sufficient to describe the property as it by its external appearance seems to be. Such a description is not calculated to mislead any one in regard to the actual contents of the package."

The rule seems to be that a *bona fide* holder of the warehouse receipt will be protected to this extent, as to all representations of fact which are within the knowledge of the warehouseman who gives the receipt, or which from the nature of the goods, or in the ordinary course of business, ought to have been within his knowledge; but further than this the law has not gone.<sup>26</sup>

At most, therefore, it can only be said that a warehouse receipt is *quasi-negotiable*; not negotiable paper under the law merchant. The contract is open to equities; the assignee standing in no better position than that of the bailor of the property.<sup>27</sup> The redelivery of the property stored would be a complete compliance with the contract expressed in the receipt of the warehouseman, except, perhaps, in a case where, because of the negligence of the warehouseman, a receipt for valuable property was given, where inferior and worthless commodities were

<sup>26</sup> First Nat. Bank of Chicago v. Dean, 137 N. Y. 110.

<sup>27</sup> Edwards on Bailments, 287; Willard v. Bridge, 4 Barb. 361; Suydam v. Smith, 7 Hill, 182;

Thompson v. Dominy, 14 M. & W. 403; Blanchard v. Page, 8 Gray, 281; Bank of Rochester v. Colt, 15 Barb. 506.

actually received and stored, and the receipt had for value been received by assignment or indorsement by a *bona fide* holder; and this not because the receipt is negotiable in the sense of commercial paper, but because of the negligence of the warehouseman in holding out to the *bona fide* holder that the valuable goods are in store, and for this reason he is estopped from denying the receipt given.

The delivery of the goods to be stored and the giving of the receipt therefor, reciting that they are to be redelivered upon presenting the receipt properly indorsed, or upon the order of the owner or bailor, creates a bailment. The very essence of the contract is that the same property shall be returned; so any contract which does not provide for a return of the same property would not be a bailment contract, but one of sale or exchange.<sup>28</sup> The transfer of the receipt does not create any new rights, and has no other operation or effect than as a symbolical delivery of the property.<sup>29</sup>

<sup>28</sup> Norton v. Woodruff, 2 N. Y. 153.

<sup>29</sup> Hale and others v. Milwaukee Dock Company, 29 Wis. 482, was a case where the owner pretended to deliver for storage barrels of mess pork, and obtained a receipt from the warehouse company for barrels of mess pork, when in reality the barrels contained only salt. The receipt in due course of business gave to the plaintiff a security for a loan. The defendant refused to deliver barrels of mess pork and an action was brought. The court says: "The receipt of a warehouseman or wharfinger, and the receipt or bill of lading of a common carrier, are contracts of precisely the same general nature and effect, and should obviously be governed by the same rules and principles, as to the application of the doctrine of estoppel or negotiability, which, with respect to such contracts, means one and the same thing. They are or may be said to be ne-

gotiable or conclusive in the hands of a *bona fide* assignee or holder for value, so far as the party executing them, warehouseman or carrier, has made, or is bound by, the representations contained in them. They are negotiable or conclusive and valid in the hands of such a holder, because the signer, or party by whom they are executed, is estopped, or not permitted to deny the existence of the facts represented in or by them, and which are presumed to have been within his knowledge at the time of their execution. Negotiability, or *quasi-negotiability* as it has sometimes been more properly called, and estoppel, when spoken of with respect to such instruments, mean, therefore, one and the same thing. In Rowley v. Bigelow, 12 Pick. 307, 314, and Stanton v. Eager, 16 id. 467, 474, carriers' receipts or bills of lading are spoken of as *quasi-negotiable*, which is the more accurate form of expression. A bill

§ 175. **Negotiability of receipt provided by statute.**—In most of the states the receipt, so far as possible, is made negotiable by statute; these statutes providing that the receipt may be transferred by indorsement and delivery, and that the indorsement may be either in blank or to the order of another, and shall be deemed a warranty that the indorser has good title and lawful authority to sell the property named in such receipt, and generally providing that the transferee of the property, by negotiating the receipt, shall be subject to the lien of the warehouseman for charges and advances.

These statutes, as a general rule, have provisions with reference to the issuing of receipts by the warehouseman as security for money loaned, and usually provide that the warehouseman shall not issue receipts or vouchers for personal property to any person or corporation as security for money loaned or for other indebtedness, unless such property so receipted for shall be at the time of issuing such receipt or voucher in the custody of the warehouseman without incumbrance, and actually in store and under his control at the time. The negotiability of the receipt, the manner of issuing it, and the rights and privileges of the

of lading or carrier's receipt for goods to be transported, and the receipt of a warehouseman or wharfinger for goods in store or to be forwarded, are both contracts of bailment. Both the carrier and the warehouseman are bailees for hire, the former agreeing to carry and deliver the identical goods or property received at the place designated or agreed upon, and the latter to forward or redeliver or return the very same goods or property on presentation of the receipt, unless there be some express agreement, or known usage, or custom of trade or business, showing that the parties otherwise intended. It is of the very essence of both agreements that the very same property received shall be carried, delivered or returned to the party who may be entitled thereto, in

discharge of the obligation of the bailees. The delivery or return of the same property, and of no other, will discharge such obligation or duty and satisfy the terms of the contract. Even in case of fraud, or wilful untruth, or misrepresentation on the part of the bailee, or, in a case like the present, where he is himself deceived or misled, without fault on his part, by the fraudulent concealment or devices of the bailor, no other or corresponding property or goods can be tendered in performance of the contract. In the former case, the bailee (and in the latter also, if liable) must respond in damages for the value of the property represented by the receipt, unless the party entitled to the same elects to receive other property instead."

warehouseman and the holder of the receipt, depend very largely upon the statutes of the several states. It will be therefore be necessary, in order to determine fully the rights, privileges and liabilities of the warehouseman in the different states in this regard, to consult the several statutes.<sup>30</sup>

It may be said, however, that even under the several statutes, negotiability of the receipt cannot be extended beyond the express term or provision of the statutes; that is to say, these statutes making warehouse receipts negotiable are such an innovation

<sup>30</sup> Michigan Com. Laws, 78, sec. 5037-39, provide that "warehouse receipts shall be negotiable and may be transferred by indorsement and delivery either in blank or to the order of another, except where the words 'non-negotiable' are plainly written, printed or stamped on the face thereof."

Massachusetts Public Statutes, 419, provide "that the warehouseman shall give receipt for the property negotiable in form, and that the title to the property stored shall pass to the purchaser or pledgee by the indorsement and delivery to him of the warehouse receipt therefor, signed by the person to whom such receipt was originally given, or by the indorsee of the receipt; provided that every such warehouseman shall, upon request of any person depositing property, give to such person his warehouseman's non-negotiable receipt; such receipt to have plainly printed, written or stamped upon it 'non-negotiable,' and that the assignment of such non-negotiable receipt, to be effectual, must be recorded on the books of the warehouseman who issues it." See Amendment, Supplement 1882-88, 423.

Illinois Revised Statutes, 98, 1270, sec. 156, provide "that the

receipt shall be transferable by indorsement, and that such indorsement shall be deemed a valid transfer of the property."

Indiana Ann. Stats. 1854, sec. 8722, provide "that all receipts issued by any warehouseman, as provided in this act, shall be negotiable and transferable by indorsement in blank, or by special indorsement and with like liability as bills of exchange now are and with like remedy thereon." There are other provisions requiring that receipts shall only be given for property stored, and forbidding fraudulent receipts; also providing that the warehouseman shall not sell, incumber, ship, transfer or move beyond his immediate control any property for which a receipt shall be given without the consent of the holder of the receipt.

Tennessee Code, 1896, sec. 3605, enacts that warehouse receipts shall be negotiable, except in cases where the words "non-negotiable" are written, printed or stamped upon the receipt.

California, Connecticut, Iowa, Kansas, Kentucky, Maine, Maryland, New York, Wisconsin and other states have enactments upon this subject.

upon the law governing the negotiability of commercial paper, that the courts would give to the statutes a strict construction, and their negotiability would be confined to the strict provisions of the statute.<sup>21</sup>

**§ 176. Warehouseman not permitted to impeach his receipt.** While, as we have seen, the warehouseman will be permitted to show in certain cases that the property received was not of the kind represented and receipted for, in cases where it can be said that the custodian, the warehouseman, knew or ought to have known what kind of property he did receive for storage, he will not be heard to impeach his receipt. And so it has been held that "a warehouseman who receives wheat for storage, giving receipts therefor, designating and guaranteeing the grade and quantity of the wheat, becomes liable for damages to a transferee of such receipt by refusing to deliver the wheat called for, and delivering wheat of an inferior quality."<sup>22</sup>

**§ 177. Warehousemen may insure the property.**—There seems to be no question but that the warehouseman or wharfinger may insure the property in his possession in his own name,

<sup>21</sup> Warehouse receipts *quasi*-negotiable, transfer of it equivalent to constructive delivery and passing title of property stored. Farmers', etc. Bank v. Bennett, 120 Ga. 1012, 48 S. E. 398; Lewis v. First Nat. Bank, 46 Or. 182, 78 Pa. 690; Millhiser, etc. Co. v. Gallego, etc. Co., 101 Va. 579, 44 S. E. 760. Where goods bulky, a delivery of receipt a constructive delivery of the property, good against all the world. Bush v. Export Storage Co., 136 Fed. 918. To constitute a pledge of property by transferring receipt, the receipt must have been issued by one having possession of the property. In re Rogers, 125 Fed. 169, 60 C. C. A. 567; Millhorn v. Clow, 42 Or. 169, 70 Pac. 398.

<sup>22</sup> Lawson v. Genesee Farmer, etc. Co., 43 Pac. 191; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec.

380; Babcock v. People's Savings Bank, 118 Ind. 212. While the warehouseman's receipt is an acknowledgment that he received the goods and estops him from denying that fact, it has reference only to goods that are visible and open to inspection, and the warehouseman is not precluded from showing that the loss proceeds from some cause which existed but was not apparent when he received the goods. Robson v. Swart, 14 Minn. 371, 100 Am. Dec. 238. A warehouseman is not estopped from disputing a receipt issued by mistake and not intentionally, even where it has been taken as security for a loan. Second Nat. Bank v. Walbridge, 19 Ohio St. 419, 2 Am. Dec. 408; St. Louis, etc. R. Co. v. Knight, 122 U. S. 79, 30 L. Ed. 1077; Warehouseman not bound to open

and in case of loss collect the whole amount of insurance for the satisfaction of his claims against the goods or property, holding the residue for the owner, and no permission from or notice to the owner is necessary to effect such insurance.<sup>33</sup>

It may be said to be a general rule that the warehouseman is not bound to insure the property left in his custody unless there is some special undertaking so to do, in which case he would be bound to do so; but circumstances might be such that the courts would hold that ordinary diligence would require the custodian to insure the property. As, for example, where the property belongs to the estate of an infant who has little or no knowledge or experience in matters of business, and ordinary business care and prudence would demand that the property be insured, where by the terms of the contract of storage, or by agreement, the warehouseman agrees to insure the property and fails to do so, he is liable in case of loss to the owner because of his neglect. If, however, the owner did not rely upon the warehouseman, and effected the insurance himself, he could not sustain an action against him for the neglect.<sup>34</sup>

and inspect barrels. *Hale v. Milwaukee, etc. Co.*, 29 Wis. 488, 9 Am. Rep. 603; *Dean v. Briggs*, 137 N. Y. 274, 38 Am. St. Rep. 721, 19 L. R. A. 302, and notes.

<sup>33</sup> *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Baxter v. Hartford Ins. Co.*, 11 Biss. (U. S.) 306; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1. "The law seems to be well settled that a person having goods in his possession as consignee or on commission may insure them in his own name, and in the event of loss recover the full amount of the insurance, and, after satisfying his own claim, hold the balance as trustee for the owner." *Hough v. People's F. Ins. Co.*, 36 Md. 398; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Siter v. Moritz*, 13 Pa. St. 218.

<sup>34</sup> *Lancaster Mills v. Merchants'*

*Cotton Press Co.*, 89 Tenn. 1. The supreme court of Georgia, in *Zone v. Hannah*, 106 Ga. 61, held that "a statement in a warehouse receipt, 'all cotton stored with us fully insured,' does not constitute a contract between the parties, requiring the warehouseman to insure the cotton of his customers, and rendering him liable for the value of the same when destroyed by fire." But in *Thompson v. Thompson*, 73 Minn. 379, 81 N. W. 204, it was held that the storage receipt created an obligation by implication to insure the property. In that case the blank storage receipts used were in the following language:

"La Grange Elevator of Appleton, Minn.

"Smith & Thompson, Proprietors.

"— bush. No. — wheat —  
price — cents. Received in

Mr. Justice Gray, in *Eastern R. Co. v. Relief Fire Ins. Co.*,<sup>85</sup> says: "By the law of insurance any person has an insurable interest in property by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in or lien upon or possession of the property itself. Thus, a common carrier has an insurable interest in the goods carried by him, which he may insure to their full value without regard to his liability to the owner of the goods. So has a warehouseman, although he is liable only for his own negligence to the owner. And the charterer of a vessel has covenanted to pay its value in case of loss, or to obtain insurance upon it against the usual risk, has an insurable interest in the vessel."

In *White v. Madison*<sup>86</sup> the court of appeals of New York held that a sheriff who had seized goods upon an attachment had such an interest in the goods as would warrant him in effecting insurance of the property, and that a policy taken by him through his deputy would be valid. The court say: "I think the sheriff had an insurable interest in the goods, and that the policy was valid. The sheriff, by the seizure on the attachment, acquired a special property in the goods, which would have enabled him to

store — — —, 189—, account of — — —, or order, — — bushels No. — — wheat. Which amount, kind and grade will be delivered to the holder of this receipt upon surrender thereof, subject to the following conditions as to storage, etc.: The first fifteen days from date thereof, or fractional part thereof, one-half cent per bushel, but shall not exceed four cents for six months. This charge for storage shall cover loss by fire only. All other damages by the elements, or by heating, or not, or by the act of God, or which in any way have been caused by the holder of this receipt, shall be accepted.

"SMITH & THOMPSON, Proprietors."

These forms were used in re-

ceipting for a large amount of wheat received. The elevator and contents were destroyed by fire. The action was brought to recover the value of the wheat. *Held*, that this storage receipt by implication constituted a contract of insurance by the warehouseman against loss by fire.

<sup>85</sup> 98 Mass. 420-423; 3 Kent's Com. 276; Insurance Co. v. Chase, 5 Wall. 513; Wilson v. Jones, L. R. 3 Exch. 150, 151; Carnley v. Cohen, 3 B. & Ad. 478; Waters v. Monarch Assurance Co., 5 El. & Bl. 870; Oliver v. Green, 3 Mass. 133; Bartlett v. Walter, 13 Mass. 267. See note 52 L. R. A. 341, title "Held by bailee or warehouseman."

<sup>86</sup> 26 N. Y. 117-126.



maintain an action and to recover their full value against any one who should take them out of his custody. Such special property gave him an insurable interest. It was his duty to keep the property safely until sold or released, and he was chargeable for its destruction by any cause against which he could protect it by ordinary care, if he was not subject to a more stringent rule of responsibility. Although he was under no obligations to insure, he could, if he chose, protect himself against this risk by insurance."

§ 178. Usage and general course of business to a certain extent defines the duty of warehouseman as bailee.—As we have seen, in certain cases the bailee or warehouseman may discharge his full duty by delivering to the owner, or bailor, or to his assignee of the property, other property than the identical property for which the receipt was given, if the property delivered be of the same kind, grade and quality as the subject of the bailment. Such a delivery, however, does not in all cases discharge the warehouseman of his duty in the premises. It is readily understood from the very nature of the property and the usual course of dealing that a storage-keeper could not discharge his liability as keeper of chattels, such as furniture and manufactured articles placed in his custody for safe storage, by delivering to the bailor, or his assignee, property other than that which was the subject of the bailment, and claimed to be of the same kind, quality, quantity and value, but that he would be required in such case to deliver the identical property which was placed in his custody by the bailor. On the other hand, where grain, as, for example, wheat, is placed in the warehouse, unless there is some special contract to the contrary, usage and the general course of business, which is well known to the commercial world and among dealers, would permit that the warehouseman might deliver to the bailor, or to his assignee, to satisfy the receipt which was given, grain of the same grade, quality and value.

Now, the question arises, under what circumstances and to what extent is the one rule or the other to be followed in discharging the duty incumbent upon the warehouseman. The circuit court of the state of Rhode Island, in the case of *Fifth National Bank v. Providence Warehouse Co.*,<sup>37</sup> discussed this

<sup>37</sup> 17 R. I. 112, 9 L. R. A. 260.

question to some extent. In that case a quantity of eggs was received for storage by the defendant, and the following receipt was given for them:

No. 5175.  Marks.  Stored in Section B.	"Providence, September 28, 1888. "Providence Warehouse Company: "Received on storage of A. F. Alver- son Company, subject to the order of the Fifth National Bank, 390 cases eggs, to be delivered according to the indorse- ment hereon but only on the surrender and cancellation of this receipt, and on payment of the charge payable thereon. "S. J. Foster, Mgr."
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There were no distinguishing marks on the cases of eggs, and none noted in the margin of the receipt; the eggs were received and stored by the defendant. Upon this property the owner, a produce dealer, borrowed of the plaintiff the sum of \$1,950 upon the warehouse receipt; the owner had other eggs in the warehouse, some of which may have been stored with these, but this particular lot was specially known to the manager and servants of the warehouse from the fact that a portion of the property became wet when the defendant was putting it into the warehouse. The plaintiff, who had loaned the money, brought this action to recover the value of the eggs. The contention of the defendant in this case was, that having kept other cases of eggs belonging to the owner subject to the bailee's order, the bank, it had the right, in the absence of distinguishing marks, to deliver the eggs stored under this receipt, and that therefore it was not liable for such delivery without the plaintiff's order, and to support this contention the defendant cited several cases. The court in its opinion said: "These are cases where grain was deposited according to usage in common bulk, being necessarily indistinguishable, and the several depositors were held to be tenants in common of the common stock."<sup>28</sup>

"Consequently, in the first case (cited by defendant) loss by diminution or decay was to be borne *pro rata*; in the second,

<sup>28</sup> Dole v. Olmstead, 36 Ill. 150,  
41 Ill. 344; Preston v. Wither-  
spoon, 109 Ind. 457; Rice v. Nixon,

97 Ind. 99; National Exch. Bank  
v. Wilder, 34 Minn. 149.

where there was a commingling of grain of the warehouseman, who was publicly selling and shipping from the common mass, and apparent ownership and authority to sell was conferred upon him, so that the depositor was estopped to assert title against an innocent purchaser in the usual course of business; in the third case, where the warehouseman sold in the same manner, leaving enough to supply the depositor, the bailment continued, and the warehouseman was not liable for loss from an accidental fire without negligence. These cases are, therefore, quite different from the case at bar, and depend upon very different considerations, aside from the different point involved. It is obvious that grain in an elevator is practically incapable of distinction and can hardly be stored without commingling; but it is not so with merchandise packed in cases.<sup>39</sup> The warehouseman can place them in separate lots or he can mark them with the number of the receipt." The court further say: "In the case before us the eggs were delivered without an order from the plaintiffs with full knowledge that they were covered by the receipt which stipulated that they were subject to the bailee's order.

"It is urged in justification that these eggs were out of cold storage, and other eggs were kept in cold storage to answer the receipt. To this the plaintiff replies that the eggs covered by this receipt were fall eggs, fresher than the others and of greater value. However this may have been, we think that it is clear that the plaintiff, under this receipt, has the right of a bailor, and is not bound to receive other property of this description in place of its own when the bailee has intentionally delivered it to another. The transferee has the right to suppose that the described property is held subject to his order. How is he to know that the warehouseman has mingled it with other like property so as to be indistinguishable from it, if such were the case? Surely, the warehouseman is bound to some degree of care and responsibility to enable him to deliver what he receives. If it is enough that he deliver anything answering the same general description, a warehouse receipt is indeed a precarious security. The delivery to Alverson who deposited the eggs is no defense, since by its contract the defendant assumed

<sup>39</sup> Jones, Pledges, 308.

the obligation to deliver only upon the order of the plaintiff, knowing from the course of business that the plaintiff had advanced money upon the receipt."

In the case of *Stewart v. Phoenix Ins. Co.*<sup>40</sup> receipts were given for forty bales of cotton variously marked, deliverable only upon the indorsement of the secretary of the bailee. The depositor failing in business, the warehouseman notified the secretary of the company that the creditors of the bailor were replevying cotton which he had in store, and requested the secretary to take forty bales to secure the company or to defend the replevying suit. Upon this the secretary of the company inquired of the warehouseman if the same identical bales that were deposited with him were in his possession. To said inquiry the bailee answered that they were not. Thereupon the secretary of the company declined to accept the forty bales of cotton offered, and afterwards brought suit to recover the value of the cotton that was deposited. Oral testimony was sought to be given upon the part of the warehouseman to prove that there was an understanding that the receipt could be satisfied by the delivery of other cotton. The court, however, excluded this testimony upon the ground that it would tend to vary and alter a written contract, and the plaintiff had judgment.

The Wisconsin court, in *Hale v. Milwaukee Dock Co.*,<sup>41</sup> held "that a warehouse receipt was a contract binding the receiptor to safely store and deliver the same goods to the holder of the receipt, except in those cases where there is some expressed agreement or known usage of trade which shows that the parties otherwise intended."

In *Goodwin v. Scanlon*<sup>42</sup> the court held "that the defendants being warehousemen, and having given their storage receipt for a specific number of barrels of pork, could not set up the want of segregation to avert their liability; that by their receipt they have charged themselves and are estopped; that if a warehouse-

<sup>40</sup> 9 Lea, 104.

<sup>41</sup> 29 Wis. 482. "The meaning of this (receipt) clearly shows that the same fifty-four barrels received in store and described as mess-pork are deliverable or to be delivered to the bearer of the re-

ceipt on return of the same and payment of storage; and the warehouseman, not less than the ship-owner or carrier, is bound to deliver the identical goods received in fulfillment of his contract."

<sup>42</sup> 6 Cal. 541.

man would protect himself from liability in such cases, he can do so by describing the goods as part of a larger lot and unseparated, or in bulk with the goods of others. Such a description would give notice to any transferee of the warehouse receipt of the condition of the goods and enable him to use necessary diligence in obtaining the title to a specific property." Thus it will be seen that the usage of trade and the general course of business have been controlling factors in determining the question involved; that where the property, like grain in an elevator, is from its nature practically incapable of distinction, and where the storage is generally understood to result in commingling of the same, the warehouse receipt can be satisfied by the delivery of grain of the same grade, quality and quantity as that stored; but no such rule as this could be said to be applicable or required by usage or the usual course of business where the property stored is of a kind that it may be and usually is kept separate and by itself. As, for example, where it is packed in cases, or where it is by its very nature capable of being identified and known by its appearance and description; like furniture, books, cloths, mechanical tools, and the like. This distinction must necessarily be kept in view in the discussion of the next subdivision of our subject.

**§ 179. Storage-house keepers.**—Storage-houses are places or buildings provided and kept by persons or companies for the storage and care of goods, wares and merchandise for hire, to be redelivered in the same condition as when received. This term only applies where the safe custody and return of the goods are the principal objects of the deposit, and not where it is merely incidental, and the keeping is as well for the purpose of consumption or for speculation.

These storage-houses are carried on by private owners, and often by large storage companies, whose business is principally the caring for furniture, household goods, and other articles and chattels which are expected to be returned to the owner upon demand and payment of charges.

In connection with the business, and as incident to it, the storage companies, or storage-house men, generally carry on the business of moving the goods to and from the place of storage, and for that purpose run moving-vans, trucks and drays, employing their own force of men for handling the property.

This business in most respects is similar to that of the ware-

houseman, but has grown to such proportions that mention of it as a business by itself seems proper.<sup>43</sup>

§ 180. **Must comply with the contract for storage.**—The warehouseman or storage-house keeper must comply strictly with the contract for storage. And where the contract is to store the property in a specified warehouse it is the duty of the warehouseman to so store it; and if it is stored at a different place it is at the risk of the warehouseman, and if injured or destroyed even without the fault or negligence of the warehouseman he is liable.

In *Hudson v. Columbian Transfer Co.*,<sup>44</sup> the court say: "The theory of the plaintiff's case is that the defendant broke its contract of bailment and subjected the property to a risk never con-

<sup>43</sup> *Jones v. Morgan*, 90 N. Y. 4. "Defendant owned a building in the city of New York, used and occupied as a storehouse. Under an agreement with plaintiff, who desired to store for safe-keeping certain household furniture, a space was allotted to her in said building, and defendant assured her that her goods would be safe, and would be guarded day and night. The allotted space was inclosed by wooden partitions with a door, upon which were two locks, the key of one of which was kept by plaintiff. When money was paid by plaintiff it was receipted for, generally as paid for storage. Most of the property was stolen by those in charge of the building. In an action to recover damages the court charged, in substance, that the contract was one of bailment; that defendant, if liable at all, was liable as a warehouseman, and bound to exercise ordinary care and prudence. Held, no error. It seems immaterial whether the contract was one of bailment or of hiring the allotted room, as in either case defendant was bound to exercise ordinary care and prudence in guarding the goods."

<sup>44</sup> 137 Mich. 255, 257, 100 N. W. 402, and see cases cited; *Martin v. Cuthbertson*, 64 N. C. 328; *Lane v. Cameron*, 38 Wis. 603; *Lelley v. Doubleday*, L. R. 7 Q. B. Div. 510; *Bradley v. Cunningham*, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679; *Line v. Mills*, 12 Ind. App. 100, 39 N. E. 870; *St. Losky v. Davidson*, 6 Cal. 643. And where it appeared that the plaintiff's manager asked the defendant's treasurer what the storage on the goods would be, and at the same time notified him that the warehouse company would have to store the goods where they would not freeze, and the treasurer of defendant said that they would not freeze in their basement or on their third floor; and plaintiff's manager requested defendant to acknowledge the arrangement by mail, which defendant did by letter, merely confirming the charge to be made for storage, it was held that a request to charge the jury that the language used in making the contract did not amount to an agreement to store the goods so that they would not freeze, was properly refused. *Phenix, etc. Co. v. Dennis, etc. Co.*, 189 Mass. 82, 75 N. E. 258.

templated by plaintiff, nor assumed or assented to by him. In such a case the rule is general that the bailee assumes the risk of the destruction of the property." The owner is entitled to have his property remain in the place contracted for, and if the storage-house keeper removes it to another warehouse or place of storage, without the knowledge, consent or approval of the owner, no matter if he deems it more secure, and it is injured or destroyed, the storage-house keeper will be liable for the loss or injury. Nor is it a defense that he used more than ordinary diligence in trying to avoid the loss or injury, and should it appear that it was an inevitable accident, that it was caused by an act of God, he will be liable, because by violating the contract for storage he assumed the risk, and became liable for a conversion of the property.

And so where it was shown that the parties to the agreement intended that the property should be stored at a certain place, and contracted with reference to storage there, the goods being delivered by the bailor and stored by the bailee, it is held to be an agreement to store at that place, and a conventional warehouse receipt showing no particular repository will not be held to change the parol agreement and intention as to place of storage.<sup>45</sup>

§ 181. **Some of the duties of the bailor.**—The bailor, or owner of goods to be stored, may be said to be under obligation to exercise good faith toward the bailee, the storage-keeper, in respect to this bailment. Among other things, he would be bound to give to the bailee full knowledge of the kind of goods put into his store-house in order to bind the keeper to the ordinary liability that attaches. If the goods or property were very valuable, as jewels or diamonds, and were secreted or hidden away among the other goods, and the knowledge of them kept from the bailee, the bailor could not hold the custodian to the same degree of liability, if the goods were lost or destroyed, that he might if the attention of the bailee had been called to these valuable articles.

§ 182. — **Dangerous articles.**—It is the duty of the bailor not to deliver to the bailee for storage any dangerous thing, or that which might result in danger or injury to the property, person or business of the storage-house keeper, or to the property of others whose effects are being stored, without first giving to

<sup>45</sup> *McCurdy v. Walblom, etc. Co.*, 94 Minn. 326, 102 N. W. 873.

the keeper full knowledge of the character of the property, and notice of the danger in handling or keeping it; and if the bailee should suffer any injury because of the failure of the bailor to thus do his duty, the bailor would be liable. As, for example, if the property was very explosive, or if explosives were among the goods and chattels, or if the goods were infected with contagious diseases, it would be the duty of the bailor to fully apprise the bailee of the facts.

§ 183. **When the liability of the storage-house keeper begins.** Following the rule already laid down, it may be said that this liability commences at once upon his obtaining control of the property, and very much would depend upon the usage and manner of doing the business. If the property was taken possession of at the house or premises of the owner and loaded upon the truck or moving van of the storage-house keeper, the liability would commence at that time; for the control and possession of the property would be then in the storage-house keeper.<sup>46</sup>

§ 184. **When the liability ends.**—It is the duty of the storage-house keeper to deliver the goods to the bailor, or to his order upon demand, and payment of charges and the liability does not end until the goods are so delivered.

§ 185. **Storage-house keeper and warehouseman the same.**—The warehouseman includes the storage-house keeper, the latter carrying on a species of the business of the warehouseman, and by making separate mention of it here we do not intend to infer that a distinction exists, to be pointed out, but that this particular branch may receive special notice.

<sup>46</sup> "It is held that the liability of the warehouseman commences as soon as the goods arrive and the crane of the warehouseman is applied to raise them into the warehouse. *Thomas v. Day*, 4 Esp. 262; *Merritt v. Old Colony, etc. R. Co.*, 11 Allen, 80, 83. See *Shepherd v. Bristol, etc. R. Co.*, L. R. 3 Exch. 189; *Smith v. Nashua, etc. R. Co.*, 7 Fost. (N. H.) 91. And he is liable for negligent injury to the goods while in his possession, although it appears that after the happening of the injury the goods

were destroyed without his fault, and that they must have been so destroyed even if no damage had previously occurred. *Powers v. Mitchell*, 3 Hill, 545. So, if through the negligence of the servant of the warehouseman, the goods are not delivered to the consignee when called for by him, and they are destroyed by an accidental fire, the warehouseman will be held responsible for their loss. *Stevens v. Boston & Maine R. Co.*, 1 Gray, 277."



§ 186. **Common carriers, when warehousemen.**—It is often a very important question to determine whether the carrier's relation is that of a common carrier or a warehouseman. If the relation is that of a common carrier, then his liability may be that of an insurer; but if it is that of a warehouseman, then he is only liable for ordinary negligence and is held to ordinary diligence.

The test which determines whether the carrier's relation is that of a warehouseman or a common carrier seems to be whether the goods have been delivered by the shipper for the purpose of immediate transportation without further orders.<sup>47</sup> If the delivery of the goods is not for immediate shipment, but by order of the owner they are to be detained for some purpose and the shipment to be some time in the future, in such case the relation of the carrier is that of a warehouseman. The general rule is that, if something remains to be done after the goods have been delivered by order of the shipper, the liability of the carrier is that of warehouseman merely.<sup>48</sup> If the shipment is delayed, however, through the carrier's acts and not by the request or action of the shipper, in such case the relation of common carrier is not changed to that of a warehouseman, nor is the liability changed. When the property is delivered to the common carrier it is presumed to be for immediate shipment; the law presumes

<sup>47</sup> *Fitchburg R. Co. v. Hanna*, 6 Gray (Mass.), 539; *Goodbar v. Wabash R. Co.*, 53 Mo. App. 434; *Pittsburg R. Co. v. Barrett*, 36 Ohio St. 448; *Clark v. Needles*, 25 Pa. St. 338.

<sup>48</sup> *St. Louis R. Co. v. Knight*, 122 U. S. 79; *Barron v. Eldridge*, 100 Mass. 457; *Watts v. Boston R. Co.*, 106 Mass. 467. Goods left in the company's warehouse for future transportation through an arrangement with the baggage-master are in the company's charge as a warehouseman only, regardless of what the baggage-master may have agreed, since he had no authority to bind the company. *Mulligan v. Northern Pacific R. Co.*, 4 Dak. 315, 29 N. W. 659, 27

*Am. & Eng. R. Cas.* 33. Where a shipper stores goods from time to time in a railway warehouse, loading a car when a carload is ready, the responsibility of the railway company in respect to such of the goods as have been specifically set apart for shipment is not that of a carrier but of a warehouseman; and in case of their accidental destruction by fire, the shipper has no remedy against the company. *Milloy v. Grand Trunk R. Co.*, 21 Ont. App. 404, 55 *Am. & Eng. R. Cas.* 579; *Ill. Cent. R. Co. v. Ashmead*, 58 Ill. 487; *Ill. Cent. R. Co. McClellan*, 54 Ill. 58; *Ill. Cent. R. Co. v. Hornberger*, 77 Ill. 457.

this, and it is the duty of the carrier to at once ship the property, and if he delays the shipment, he cannot by such delay change his liability.

In *Gregory v. Railway Co.*<sup>49</sup> it was held that a delivery to a carrier implies a direction for immediate shipment; and the fact that the shipper consents that the goods may lie in the depot until the carrier can secure a car does not relieve the carrier from liability as an insurer.<sup>50</sup>

§ 187. **As to goods awaiting delivery.**—As to when the relation of warehouseman takes the place of that of a common carrier as to goods that have been transported to their destination and are in the vehicles or warehouses of the carrier awaiting delivery to the consignee, the authorities are not entirely harmonious. There is a class of cases which holds that when the carrier has transported the goods in compliance with his contract of affreightment and has them in his cars ready to be unloaded, if the goods are such as the consignee usually takes from the cars, or in the freight houses, if of the kind of goods that are usually unloaded and put into the freight houses by the carrier, the carrier has done his whole duty, and it is the duty of the consignee to call for and take the goods away without notice from the company; and, that during the time the goods are held at their destination awaiting delivery to the consignee, the carrier's liability as such does not attach, but is limited to that of a warehouseman, and he is only liable as such. That is to say, he is no longer an insurer, but a custodian of the property, a *locatio*

<sup>49</sup> 46 Mo. App. 474; *Gulf, etc. R. Co. v. Trawick*, 80 Tex. 270. "Where a railroad company erects a platform for the purpose of shipping cotton, and its course of business is such that it induces parties to store cotton on it under a promise to ship such cotton by the next freight train, but instead of doing so allows the train to pass without taking on the cotton, it is responsible as a common carrier for the cotton, and is liable for its subsequent loss by fire." *Meyer v. Vicksburg, etc. R. Co.*, 41 La. Ann. 639.

<sup>50</sup> But the liability of a common

carrier does not begin as such until there has been a complete delivery of the goods for immediate transportation with the knowledge and consent of the carrier. *Louisville, etc. R. Co. v. U. S.*, 39 Ct. Cl. 405. And where a railroad company finds goods in one of its cars without bill of lading or other instructions and removes them to a storehouse, requesting and awaiting instructions which are not furnished, the liability is that of a warehouseman, and not of a common carrier. *Louisville, etc. Co. v. United States*, 39 Ct. Cl. 405.

*custodia* bailee, liable for ordinary negligence and bound to exercise ordinary diligence. And so, if the goods while so held are destroyed, or injured, or lost, without the negligence of the carrier in whose possession they are, he is not liable.

This rule has been called and is known as the Massachusetts rule, and is followed by the courts in several other states.<sup>51</sup>

§ 188. — **The New Hampshire rule.**—Another line of cases holds to what has been called the New Hampshire rule, which is quite like the Massachusetts rule except that it holds the carrier to the full carrier's liability for a reasonable time after the arrival of the goods which is given to the consignee to call for them, inspect them, and take them away.

The rule does not require that notice be given to the consignee of the arrival, but seems to presume that he knows when the freight was shipped and when, in due course of transportation, it ought to arrive, and then allows for the consignee reasonable time after its actual arrival to take it from the carrier's custody; if it is left beyond that reasonable time, the carrier, as to the goods, becomes a warehouseman and only liable as such.<sup>52</sup>

<sup>51</sup> *Blaisdell v. Railway Co.*, 145 Mass. 132. In *Bassett v. Railway Co.*, 145 Mass. 129, the court say: "The plaintiff had employed the defendant as a common carrier to transport his goods to Chicopee. He voluntarily entered into an agreement which involved the subject of the defendant's liability for loss of the property or injury to it from any cause, and which determined his right as definitely, under the contract implied by law, as if the parties had written out and signed stipulations in detail. The defendant was bound to carry the goods and was an insurer of them until the transit ended, and was then liable, as a warehouseman, for any want of ordinary care during such reasonable time as they should remain in its custody awaiting the call of the consignee. This was the extent of its liability." Lane

*v. Railway Co.*, 112 Mass. 455; *Barron v. Eldridge*, 100 Mass. 455; *Rice v. Railway Co.*, 98 Mass. 212. The leading case upon this doctrine is an earlier Massachusetts case, *Thomas v. Railway Co.*, 10 Metc. 476, where the court discusses in detail the rule and the theory. Some of the states have followed the Massachusetts rule:

*Illinois.*—*Gregg v. Railway Co.*, 147 Ill. 550; *Porter v. Railway Co.*, 20 Ill. 107; *Railway Co. v. Jenkins*, 103 Ill. 599; *Railway Co. v. Friend*, 64 Ill. 303; *Railway Co. v. Scott*, 42 Ill. 132.

*Indiana.*—*Cincinnati, etc. R. Co. v. McCool*, 26 Ind. 140.

*Iowa.*—*Mohr v. Railway Co.*, 40 Iowa, 578.

This rule is also followed in Georgia, Missouri, North Carolina, Pennsylvania and Tennessee. See cases cited in note, *post*, § 581.

<sup>52</sup> *McDowell v. Railway Co.*, 34

§ 189. — **The third class of cases.**—A third class of cases holds to still a different rule, and, as it seems to us, the best reasoned rule and having the weight of authority. These cases hold the correct rule to be that, upon the arrival of the goods at their destination, it is the duty of the carrier to give to the consignee reasonable notice that the goods have arrived and to call at the company's warehouse and receive them and pay the freight, and until such notice has been given and a reasonable time has expired after the giving of such notice and to receive the goods, the carrier will be held to the extraordinary liability of a carrier, and not until after the time of such reasonable notice expired will his liability be limited to that of a warehouseman. This has sometimes been called the New York rule. There is no reason why it should be so called, as this state did not lead in the establishment of the doctrine, although it has steadily held to it with other states. This is also the rule in England.<sup>53</sup>

This question will be further discussed in our consideration of the duties and liabilities of common carriers, to which it perhaps more properly belongs; our object here being simply to point out the creation of the *locatio custodiæ* bailments as related to carriers.

### Second.

§ 190. **Wharfingers.**—A wharfinger is one who maintains a wharf for hire for the accommodation of vessels in receiving or discharging their cargoes, either freight or passengers, for the use of shippers in forwarding freight, goods, wares and merchan-

N. Y. 947. See also Angell on Carriers, sec. 313, and a long list of cases collected and cited from New York and other states, 5 Am. & Eng. Encyl. of Law (2d ed.), 266.

<sup>53</sup> *Michigan*: *McMillan v. Railway Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Buckley v. Railway Co.*, 18 Mich. 121; *Feige v. Railway Co.*, 62 Mich. 1; *Black v. Ashley*, 80 Mich. 90; *Walters v. Detroit, etc., Ry.*, 139 Mich. 303, 102 N. W. 745.

*Minnesota*: *Kirk v. Railway Co.*, 59 Minn. 161. Following this are also Nebraska, Ohio and Texas.

Perhaps the first case that took issue with the Massachusetts rule was the case of *Moses v. Railway Co.*, 32 N. H. 523. The following states may be said to have adopted this rule: Alabama, Vermont, Wisconsin, Kentucky, New Jersey, Louisiana and Kansas. A reasonable time after notice to consignee to remove the goods the carrier's liability is changed to that of warehouseman. *Becker v. Penn. R. Co.*, 96 N. Y. S. 1, 109 App. Div. 230. Where the agent of consignee removes most of the consignment of freight from the

dise, for consignees for receiving freight and caring for it until delivery. His duties and liabilities are not unlike those of a warehouseman. Like the warehouseman he is liable for all losses which happen through his neglect to exercise ordinary diligence.<sup>54</sup>

§ 191. **When liability begins.**—The wharfinger cannot be charged with any responsibility until the goods are delivered into his possession and he has the control of them. It therefore follows that in order to hold the wharfinger for loss or injury to the property it must appear that he had control of it. And in *Blinn v. Mayo* the court held: "That a mere delivery of the goods at the wharf is not necessarily a delivery to the owners as wharfingers. The usages of business in the vicinity are of importance to show when a wharfinger acquires and when he ceases to have the custody of the goods in that capacity as in the case of common carriers."<sup>55</sup>

In some localities the usage of business requires that the wharfinger should be notified when the goods are delivered to him or upon his wharf, and it may be said that it is generally held by the courts that the wharfinger's liability does not begin until the goods are so delivered and he has notice of such delivery.<sup>56</sup>

car, but leaves some of it on account of approaching night, the carrier as to the freight left is a gratuitous bailee and liable only for gross negligence. *C. D. Kenny Co. v. Atlanta, etc., R. Co.*, 122 Ga. 365, 50 S. E. 132.

<sup>54</sup> *Cox v. O'Reilly*, 4 Ind. 368. "Wharfingers are not like common carriers answerable for all goods that may be intrusted to them in their line of business, except such as may be lost by the act of God or the public enemy. They are responsible for loss only which happens through a neglect to exercise reasonable and ordinary care and diligence. They are in the same category in this particular with warehousemen." *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143; *Blinn v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175.

Must exercise ordinary diligence. *Garfield, etc., Co. v. Rockland, etc., Co.*, 184 Mass. 60; *Barber v. Abendroth*, 102 N. Y. 406, 55 Am. Rep. 821.

<sup>55</sup> *Blinn v. Mayo*, 10 Vt. 56.

<sup>56</sup> *Packer v. Getman*, 6 Cowen (N. Y.), 757, was an action of trover to recover the value of a box of dry goods alleged to have been delivered to the defendant as master of a canal boat, to be transported from Albany to Charlestown. The court say: "Admitting that, according to the usual custom and understanding of parties, a delivery on the dock near a boat is a good delivery so as to charge the carrier, it must always be accompanied with express notice, otherwise he is not answerable."

§ 192. **When the liability ends.**—The wharfinger often stands between the shipper and the common carrier, or between two connecting carriers. The property is delivered upon his wharf for the purpose of shipment by boat, or to be delivered to some connecting carrier; and hence it often becomes very important to determine not only when his liability begins but when it ends. Property, too, is often delivered upon the wharf of the wharfinger to be by him delivered to the warehouseman. The general rule is that the liability of the wharfinger ends when he ceases to have control of the property; when he has delivered it either to the shipper, the warehouseman, the railroad company or to the consignee.<sup>57</sup>

It is true that usage and the general course of business has much to do with determining what is actually necessary in delivering the property. As, for example, a long-continued course of business or usage in accepting property that is delivered upon the wharf in a certain place, or placed in the charge of certain individuals, or servants of the wharfingers, or the delivery of goods in accordance with a long-continued usage, as the delivery of property to the officers of the ship, may have very much to do with determining whether or not there has been a proper delivery. And so in the case cited (*Cobban v. Downe*) Lord Ellenborough said: "The defendant has proved that by established usage the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them; from which time it has been considered that their responsibility is then at an end."

§ 193. **Factors or commission merchants.**—Factors or commission merchants belong to this class of bailees. They have custody of the property they are authorized to sell; they are employed as agents of the owners to sell goods or merchandise consigned or delivered to them by or for their principals and for a compensation called factorage or commission.

While the goods or property remains in their hands, they have

<sup>57</sup> In *Cobban v. Downe*, 5 Esp. 41, Lord Ellenborough says: "Undoubtedly where the responsibility of the ship begins, that of the wharfinger ends; and a delivery to the ship creates a liability there; but the delivery must be

to an officer or person accredited on board the ship; it cannot be delivered to the crew at random; but the mate is such a recognized officer on board the ship that delivery to him would be a good delivery."

the custody or control of it, and from the time they receive and take possession of the property they are liable as custody bailees; and they are held to the same degree of diligence, to wit, ordinary diligence, and are liable for ordinary negligence. Their liability, however, will be more particularly discussed when we reach that subject.

The factor of the commission merchant, must exercise good faith in caring for the property and in performance of his duty to his bailor. He can sell the property, but has no authority to pawn, pledge or mortgage it, and like other bailees of this class he must act according to the general usage of trade. In holding himself out as a factor or commission merchant to the public, he guarantees that he possesses the skill, judgment and ability that is possessed by the ordinary factors and commission merchants in his vicinity. It therefore follows that he must be held to exercise that skill, judgment and knowledge that is possessed by the ordinary bailee; it is not enough that he has exercised good faith.<sup>58</sup>

The factor cannot substitute for the goods consigned to him other goods of the same kind. If this were allowed it would give to the factor the right of converting the property of the consignor to his own use, and instead of being a bailee of the property he could assume the character of debtor to the owner of the property without his consent. His duty is to receive the goods from the consignor and follow implicitly the directions and instructions given him with reference to them; or if there are no such explicit instructions or directions, then he must take due care of the property while in his possession and dispose of it, following the general usage of the trade.

### *Third.*

§ 194. **Safe deposit and trust companies.**—An extensive and increasingly important business has been developed within comparatively the last few years among bankers and trust companies in furnishing to their customers and the public, for a compensation, privileges in banks and safe deposit vaults by way of leasing to them control of drawers or safes where they may keep deeds, securities, stock, moneys and valuable papers. The

<sup>58</sup> Story on Bailments, sec. 395; Weaver v. Poyer, 70 Ill. 567; Dunbar v. Gregg, 44 Ill. App. 527.

customers have keys to their own individual drawers, boxes or places of deposit and access to them as they please from time to time; the proprietor or safe deposit owner taking charge of the room or vault in which these boxes are situated and often keeping watchmen or agents to guard, care for and protect them from intrusion or occupancy by strangers or other customers except to examine and have access to their own drawers, safes or boxes.

These safety deposit vaults are under the supervision and control of the bank or trust companies but the boxes or safes are set apart for the use of their customers, and are controlled as to their contents, by the customers.

§ 195. **The relation between the depositor and the safe deposit company.**—The relation created because of the business and course of business in these cases has generally been conceded to be that of bailor and bailee and yet to call it that, does not seem to be entirely satisfactory in view of the conceded legal definition and status of a bailment relation as it runs counter to certain requisites of that relation. To illustrate: it is a fixed and conceded principle in the law of bailments that the bailee has the possession and control of the subject matter of the bailment to the exclusion of the bailor while in the case of renting or occupying the drawer or safe in the vault of the trust company or banking house, the possession of the chattels deposited there does not change but continues with the owner who puts them in the drawer, box or safe rented from the company, has the key and can lock it up, and control it as his own private receptacle. The situation was well illustrated in the case of *Gregg v. Hamlin*,<sup>59</sup> where the plaintiff sought to garnishee the safe deposit company. Judge Sharswood in the opinion discussed somewhat the question involved, holding that the possession of the contents of the box or safe in the safe deposit vault was in the renter, he having the key, and the valuable papers and property being locked in the box. The court was asked to make an order that the safe deposit company be allowed to break open the drawer and file an inventory of its contents with its disclosures but the court refused, saying that there was nothing due from the garnishee defendant to the owner of the box or drawer and he did not have control of any property, money or deposits made by the

<sup>59</sup> 8 Phila. (Pa.) 91.



principal defendant nor any of his goods or chattels in his possession and that the act did not apply.

Another test that might be applied. If without any fault of the safe deposit company the depositor or renter of the box or safe should be deprived of the possession of property deposited in the drawer or box kept in the vault or banking house, could the safe deposit company sustain an action of replevin for the property? Certainly not and for the very apparent reason, that the company is not entitled to the possession of it. Upon what principle then can it be contended that this relation meets the requisites of a bailment of property? It would therefore seem upon principle that we must conclude that because the relation existing between the parties will not meet these commonly applied tests, because the possession of the subject matter, the property kept in the box, drawer or safe, is legally in the owner and he at no time parts with it, that at most the relation is but a *quasi* bailment relation where the parties are bound to exercise the same degree of diligence and are subjected to the same liability, as parties to a mutual benefit bailment, but differing in their relation to the property, the actual possession remaining in the owner and not passing to the proprietor of the safe deposit vault.

§ 196. The nature of the relation—The liability of the parties.—For the reasons stated, therefore, it would appear that the relation is not that of bailor and bailee in the full meaning of that relation but that it answers more nearly to that of landlord and tenant or of leasing space in the deposit vault or banking house, or at most a *quasi* bailment relation. The question has not often been before the courts but generally it has been held to be a bailment. In *Jones v. Morgan*<sup>60</sup> allusion was made to the relation in this class of cases and it seems to have been held to be a bailment. In that case the plaintiff claimed that she had hired storage for her goods in defendant's warehouse and that his liability was that of a warehouseman, bound to exercise ordinary care and diligence in keeping the goods, while the defendant claimed that the plaintiff hired the room in which she placed her goods and that the relation between the parties if any existed was that of landlord and tenant with the responsibility on his part which such a relation implied. The court held that it was not abso-

<sup>60</sup> 90 N. Y. 4.

lutely essential to determine this difference in the contention of the parties, because whichever way it was, the defendant was bound to exercise ordinary care and prudence in guarding the property. "That such a responsibility was imposed upon him by the very nature of the transaction. The plaintiff was seeking a safe place for the storage of her goods, the defendant had a storage house in which the business was the care of goods and he assured her that her goods would be safe therein and that they would be under the care of a watchman by night and a responsible or reliable man by day. The price for the space in the storage house allotted to plaintiff was fixed in reference to these circumstances. The parties could not have intended that defendant was to take no care of the goods, the very nature of the contract and the relation between the parties imposed upon the defendant the obligation of ordinary care and prudence in keeping the goods. It is like the case of one who hires a box contained in the safe of a safe deposit company. He may keep the key but the company without special contract to that effect would be held at least to ordinary care in keeping the deposit and the duty of such care would arise from the nature of the business it was carrying on and the obligation to discharge it would be implied from the relation between the parties."

Whatever, then, the relation, all unite in saying that the trust company or banking house furnishing the safe deposit vaults, must exercise ordinary diligence in guarding and caring for the boxes or safes rented, a diligence commensurate with the usual and ordinary needs for care and watchfulness, which more or less depends on the location, the articles kept in deposit and the usual surroundings.<sup>60a</sup> Because of the undertakings of the company to watch over and care for the kind of property usually deposited, the ordinary care demanded is that care and diligence ordinarily exercised by keepers of safe deposit vaults under like circumstances and surroundings.<sup>61</sup>

<sup>60a</sup> Where plaintiff rented a safe in a deposit vault and received only one of two keys, and his money was taken from the vault when in charge of boys who were paid small salaries and as to whose honesty defendant was ignorant, a finding that defendant was negligent in guarding the

money was justified, and that the burden was on the defendant to show he used diligence. *Cussen v. Southern Cal. Savings Bank*, 133 Cal. 534, 65 Pac. 1099.

<sup>61</sup> Where defendant permitted the property to be taken upon an illegal writ, it was held that the defendant failed to use that care

*Fourth.*

§ 197. — **Other classes of custodians.**—There are other classes of business and persons that should be mentioned as belonging to the class of custodians under discussion; as, for example, officers who have in their custody property taken upon writs of execution or attachment,<sup>61</sup> administrators who have in their possession and under their control the personal effects of estates, innkeepers who have charge of the baggage and effects of their guests, pledgees who hold property as security for the payment of money or the performance of an obligation, and numerous other examples which might be mentioned. In all these cases, as in the examples which we have thus far discussed, the question which determines whether the bailment belongs to the *locatio custodiae* bailment is, is the custody and care of the property wholly without benefit to the bailee either directly or indirectly? If it is, it does not belong to this class of bailments, but is a mere *depositum*—a gratuitous bailment.<sup>62</sup>

§ 198. **Liability of bailee in custodiae bailments.**—The general rule governing the liability of the bailee in this class of bailments—"mutual-benefit bailments"—has been often stated and is well understood, but at this time it is necessary to make special application of that rule to the several kinds and classes of

and diligence the law required in the particular case. *Onderkirk v. Cent. Nat. Bank*, 119 N. Y. 263. The court say: "It is no doubt true that a bailee for reward, such as the defendant was, may excuse himself for a failure to deliver the property to the bailor when called for by showing that the property was taken out of his custody under the authority of valid legal process, and that within a reasonable time he gave notice of that fact to the owner. *Bliven v. Hudson River R. Co.*, 36 N. Y. 403; *Western Transfer Co. v. Barber*, 56 N. Y. 544; *Brookman v. Hamill*, 43 N. Y. 554; *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391. The Ohio court has said that in this class of cases a bank is lia-

ble for the loss of a special deposit occurring through want of that degree of care which good business men would exercise in keeping property of such value. *First Nat. Bank v. Zent*, 39 Ohio St. 105; *Ray v. Bank of Kentucky*, 10 Bush (Ky.), 344.

<sup>62</sup> *Bobo v. Patton*, 6 Helsk. (Tenn.) 172.

<sup>63</sup> As to officers holding property upon writs, etc., *Blake v. Kimball*, 106 Mass. 115; *Cross v. Brown*, 41 N. H. 283; *Aurentz v. Porter*, 56 Pa. St. 115. As to the liability of sheriffs, officers whose duty is performed for recompense, and those who are finders of property when stimulated by offers of reward, *Cummings v. Gann*, 52 Pa. St. 484.

*Locatio custodiæ* bailments; the relation being the "letting of care and custody" for hire to the bailee, ordinary diligence upon his part is required, and he will be liable for ordinary negligence.

The general definition of ordinary diligence has been often referred to, and we have seen that being a relative term, it is sometimes difficult to apply it to a given case. The action of an ordinarily prudent man under just such circumstances in matters of his own cannot be measured and limited so as to arrive at the precision necessary to formulate a precise legal definition that will remove the question from the realm of facts for the determination of the jury to that of a question of law to be construed by the court. Therefore, each case must be determined upon its own facts by the aid of definitions, requirements and limitations that the law furnishes. The law, we know, requires that the bailee shall exercise ordinary prudence in caring for the property in his custody; that care which ordinarily prudent men as a class would exercise in caring for their own property, under just such circumstances; but what that care is must always be determined under proper instructions by the jury, or, if there is no jury, by the court, as a matter of fact.

§ 199. When does the liability commence and end.—The liability of the bailee in this class of bailments is for the care and custody of the property placed in his possession and control; it therefore follows that his liability does not begin until he has the possession and control of the property, and continues until the possession and control is surrendered to the bailor, or his order or assigns, or to the rightful owner.

A practical question sometimes arises between the common carrier and the warehouseman as to when the carrier's liability ceases and the warehouseman's liability begins; or in cases where the carriers are proprietors of warehouses, when their liability as carriers ceases, and their liability as warehousemen begins; whether they are still subject to the extraordinary liability of insurers, or simply liable for negligence in caring for the property.

An early case in New York (*DeMott & Ingersoll v. Laraway*)<sup>64</sup> is in this respect interesting. A common carrier, Laraway, was the owner and master of a canal boat, and received on board his boat at Troy a hogshead of molasses and other goods to be trans-

<sup>64</sup> 14 Wend. 225.

ported to Kidder's Ferry. All the goods were safely unloaded except the molasses; in an attempt to hoist the molasses from the boat into the warehouse, and when the hogshead was nearly even with the door, the tackle attached to the warehouse broke, the hogshead fell into the boat and was broken, and the molasses nearly all lost. The court held that Laraway was obliged to deliver the goods in safety. The delivery was not complete when the accident happened, and the goods were still at the risk of the carrier, and that it was a matter of no importance that the machinery employed in unloading the molasses was attached to the warehouse and belonged to it and not to the carrier. It was *pro hac vice* his tackle, and he was responsible for its sufficiency; the liability of the carrier continuing until the goods were delivered.<sup>65</sup>

The whole matter is a question as to who has taken control of the property. In *Merritt v. Old Colony R. Co.*<sup>66</sup> it would seem at first blush that a different holding was made than in *DeMott v. Laraway*. In that case an engine was carried by a truckman to the defendant's depot to be shipped upon its railway. The defendant's agent directed the truckman to back his truck up to the track near a derrick that was used by the defendant in hoisting heavy freight, and that a car would be placed there by the employes of the defendant, who would put the engine on the car. The car was placed and the men commenced to load the engine, the agent of the defendant superintending the loading; the chain broke and the property was injured. The court held that "the carrier's liability commenced when the engine was delivered to and accepted by them for the purpose of transportation; that until such delivery the truckman, who was also a common carrier, would be liable; but after such delivery and acceptance the defendant would be liable for the negligence of those employed by them to load or transport the engine; that it was for the jury to determine from the evidence whether there had been such delivery and acceptance, and in order to constitute such delivery and acceptance it must appear that the defendant had, through their agents, taken and assumed the charge and custody of the engine for the purpose of transportation."<sup>67</sup>

<sup>65</sup> Witham v. Lee, Esp. 264.

<sup>66</sup> 11 Allen, 80.

<sup>67</sup> The responsibility of a bailee begins when the goods are deliv-

ered and he has, either expressly or by implication, received them. Rogers v. Stophel, 32 Pa. St. 111.

It will be seen that the principle involved in the two cases was the same. The railroad company, by its servants and agents, took the control and direction of the property and the loading of it into their cars; having thus taken the control and possession of the property the bailment liability began and the company was held liable. It may therefore be said that the liability of the bailee commences the moment he assumes the control of the property and it is surrendered to him, and continues until the purpose of the bailment has been accomplished, or the control is rightfully surrendered to another. This is a question of fact for the jury, to be determined by the circumstances of each particular case.

**§ 200. Proper place and kind of storage.**—The reasonable diligence required of the custodian applies to the place in which he stores the property, and the kind of care and custody he gives to the property while in storage. And here the rules formerly stated apply and are essential and important in determining this question. We are to consider (1) the nature and value of the article; (2) the customs of the place or trade; (3) the condition of the country or climate, and (4) the condition of the times. These have been fully discussed.<sup>68</sup>

A rickety, tumble-down building which would not protect from the weather nor bear the weight of the property stored, which would be liable to collapse and thus injure and destroy the goods stored, would not be a reasonably fit storage-house for furniture or grain;<sup>69</sup> nor would a place well adapted for the storing of

<sup>68</sup> *Ante*, § 42.

<sup>69</sup> In an action to recover for an alleged negligent storing of the plaintiff's carriage injured by the falling in of a roof loaded with snow, an instruction that defendants were bound to exercise ordinary care, such as a prudent man would take with his own goods, and were liable if they had reason to know that the building was unsafe, was held unexceptional. *Moulton v. Phillips*, 10 R. I. 218; *Kaiser v. Latimer*, 57 N. Y. Supp. 883, was a case where the property was destroyed by the collapse of the warehouse from no

external violence, and it was held that in such a case negligence of the warehouse man will be presumed. The case was first discussed in 9 N. Y. App. Div. Rep. 36, where the facts are given. In 1894 defendant, a warehouseman, stored a large quantity of household goods and furniture for the plaintiff. In April, 1894, fire occurred causing no injury to the plaintiff's goods, but necessitating repairs to the building. The defendant proceeded to make these repairs, which consisted of the removal of burnt timbers and beams and replacing them with new

grain, or furniture, or merchandise, be considered reasonably fit for depositing valuable gems and jewelry, or the keeping of bonds and securities. Then, too, the place where the bank or safe-deposit or the warehouse is situated is an element to be taken into consideration in determining whether proper care has been exercised in the custody of the property. What might be considered reasonably safe in a small, quiet village would be scarcely any protection in a large city. An ordinary iron safe in one place might be deemed an ordinarily fit protection for the special deposits of the country bank, while in the great city it would be gross negligence to use the same kind of protection. In the city not only the latest improved deposit-vaults, with the very best of locks and appliances to protect from the burglar, but faithful, trusted men must be on guard with all the necessary appliances for calling to their aid the police force of the city. It is the usual protection given in the like business by the persons and institutions of their class that is required.

§ 201. **Diligence must keep pace with improvements.**— Since the splendid improvements by reason of the discoveries in electricity have come to be known and used, the discoveries in the use and tempering of steel, the great improvements in time-locks and alarms, the requirements of ordinary diligence have

ones, and during the progress of the work the building collapsed, damaging many of plaintiff's goods. Plaintiff brought suit and recovered a verdict of \$700. The question before the court was as to the burden of proof. The court charged the jury that the burden of proof was on the defendant who had failed to return the goods, and that he must, because of such failure, show that he acted in regard to these goods or dealt with them as a prudent man would deal with his own property. Defendant took an exception, asked the court to charge that the burden of proving negligence was on the plaintiff, and the court so held and reversed the case. In 1899 the same case, after retrial, came before the

court of appeals (57 N. Y. Supp. 883), and the court there held that "the collapse or fall of a building, from no external violence or earthquake or similar cause, is almost invariably the result of negligence, either in the construction of the building or in overloading it. It is so exceptional an occurrence that it is difficult to imagine a case to which the rule *res ipsa loquitur* would more forcibly apply;" holding, as we have said, that the negligence of the warehouseman will be presumed where the property was destroyed by the collapse from no external violence of the building in which he stored them.

Somewhat opposed to this is the case of Willett v. Rich, 142 Mass. 356.

made great advances, so that now the safe-deposit company, the trust company and the banker, to be ordinarily diligent must be equipped with these and other improved facilities to the extent that they are ordinarily used by those of their own class.

Hand in hand with the great inventions of the age go the demands of the law; the diligence of yesterday may be the negligence of to-day. The custodian for hire is bound to keep pace with the advanced requirements and practice of his class. If he does this he escapes liability when loss or injury comes to the property intrusted to him; if he fails, he has failed to be ordinarily diligent and is liable for the damages that result because of this failure. Not that it is necessary, in order to escape liability, to adopt and use the very best and newest of these appliances and inventions for the purpose of securing safety and protection to their customers, but that they are bound to use such as the ordinarily prudent custodians of their class are using; such as are ordinarily used and demanded at the place and the time, and by those engaged in like pursuits.

This question has been discussed more or less in cases where it was alleged that suitable machinery was not in use, etc. These cases are somewhat analogous to the question we are here discussing. In the case of *Titus v. Railroad Co.*<sup>70</sup> the court used this language: "Absolute safety is unattainable and employers are not insurers. They are liable for the consequences, not of danger but of negligence; and the unbending test of negligence, in method, machinery and appliances, is the ordinary usage of the business."

§ 202. **Proof of negligence.**—The bailee in this class of bailments, "*locatio custodiæ*," is required to exercise ordinary diligence and is liable for ordinary negligence in case of loss or injury to the property bailed.<sup>71</sup> His liability, therefore, depends

<sup>70</sup> 136 Pa. St. 618; *Shadford v. Ann Arbor St. Ry. Co.*, 111 Mich. 390.

<sup>71</sup> *Story*, Bailm., sec. 144; *Bogert v. Haight*, 20 Barb. 251; *Myers v. Walker*, 31 Ill. 353; *Rogers v. Stophel*, 32 Pa. St. 111; *Dimmick v. St. Paul R. Co.*, 18 Wis. 494; *Blinn v. Mayo*, 10 Vt. 56-59; *Buckingham v. Fisher*, 70 Ill. 121. In *Knapp v. Curtis*, 9

*Wend.* 60, plaintiff brought suit to recover for a quantity of salt damaged by flood. The salt was piled upon the wharf of defendants in Buffalo; the agent of plaintiff, in December, requested defendants to put the salt into their warehouse, but it was not done. In January a storm on Lake Erie, which commenced at midnight, raised the water very suddenly,



upon proof of negligence, or, under certain circumstances, proof that he exercised ordinary diligence.

The degree of care required and the facts that generally make out a case of ordinary diligence have been fully defined and discussed. As a general rule the burden of proof is upon the bailor to prove that the bailee was guilty of negligence.

and the water flowed over the wharf and injured the lower tiers of the salt in barrels. The wharves and storehouses of the defendants were built considerably higher than the water had ever previous to this occurrence been known to rise, and the salt upon the wharf was but little if any more exposed to injury from the storm than it would have been had it been rolled into the storehouse. The judge charged the jury that the defendants were liable only in consequence of neglect to use that care in the preservation of the salt that prudent men would ordinarily use over their own property; that to justify a verdict against them the jury must be satisfied that the injury complained of was occasioned by the neglect of the defendants either in not raising their wharf to a sufficient height, in not rolling the salt into the storehouse, or in not securing it after the commencement of the storm, etc. *Savage, C. J.*, in rendering the opinion of the court said: "The judge stated the law correctly to the jury that the defendants, as warehousemen or storekeepers, were not liable if they had used all the care and diligence respecting the salt in question which prudent men exercise in relation to their own property; that if they had been guilty of negligence, it must have consisted either (1) in a want of care and

prudence in not raising their wharf and storehouse higher, or (2) in omitting to put the salt in the storehouse, or (3) in omitting to secure the salt after the storm commenced. That all these points of testimony were entirely in favor of the defendants. First, that the storehouse and wharf were as high as any other, and the water had never risen so high as upon the occasion of this loss; second, had the salt been in the storehouse the damage would have been about the same; and third, the rise was so sudden that it did not appear that the salt could have been saved." *Cincinnati & Chicago Air Line R. Co. v. McCool*, 26 Ind. 140; *Lancaster Mill v. Merchants' Cotton Press Co.*, 89 Tenn. 1; *Willey v. Allegheny City*, 118 Pa. St. 490. While the law demands that the class of storage should be reasonably fit and safe, it does not require that the warehouseman shall construct buildings secure from all possible contingencies; if they are reasonably and ordinarily safe against ordinary and common occurrences it is sufficient. *Cowles v. Pointer*, 26 Miss. 253; *Waldon v. Finch*, 70 Pa. St. 460; *Hickey v. Morrell*, 102 N. Y. 454. "Evidence that poultry, when put in cold storage, was in good condition; that there was moisture in the room where it was kept; and that this would produce mould, warrants recovery against the warehouseman,

As we have seen, the bailee is not liable for loss or injury that is caused by (1) the act of God, as, for example, lightning, earthquakes, tornadoes, storms, and the like; or (2) by the act of the public enemy, as by capturing and appropriating the property and destroying or converting it; or (3) by inevitable accident, as by fire, burglary, etc., unless by exercising ordinary diligence loss by reason of these causes could have been averted.

When, therefore, the loss or injury to the property is accounted for by reason of these causes, the burden of showing that by exercising reasonable care and diligence the loss or injury could have been averted is upon the bailor.

§ 203. **Does the burden of proof of negligence shift.**—While the general rule is as we have stated, that if the bailee fails to redeliver the property when demanded, or at the expiration of the bailment returns it in a damaged condition, a *prima facie* case of negligence is made out against him, and the burden of proof is upon him to show that the loss or injury of the property

without proof of any specific act of negligence producing the moisture. *Leidy v. Quaker City Cold Storage & Warehouse Co.*, 36 Atl. 851, 180 Pa. St. 323." Must exercise ordinary diligence, such diligence as faithful warehousemen are accustomed to give under like circumstances. *Louisville, etc. R. Co. v. United States*, 39 Ct. Cl. 405; *Charlotte, etc. Co. v. Seaboard, etc. Ry.*, 139 N. C. 382, 51 S. E. 973. Where the warehouse was situated near a river and the warehouseman was warned that the river was apt to overflow its banks any hour and damage the goods if not removed, failure to remove the goods damaged by the overflow of the river rendered the warehouse keeper liable. *Lawrence L. Poina, etc. Co. v. St. Louis, etc. Co.*, 112 Mo. App. 49, 36 S. W. 873. What constitutes reasonable care held to depend on the nature of the undertaking, the confidence which it invites and the value of the care. *Ma-*

*sonic Temple, etc. Co. v. Langfelt*, 117 Ill. App. 652; *Denver, etc. Co. v. Munder*, 20 Colo. App. 56, 77 Pac. 5. Falsely representing that the warehouse was fireproof authorizes a recovery where goods destroyed because it was not as represented. *Clifford v. Universal Warehouse, etc. Co.*, 102 N. Y. S. 460. In this case court discusses what is ordinary prudence. *Hickey v. Morrell*, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824. Where contract excused liability from loss by fire, held did not excuse from exercising ordinary care to protect the property from fire. *Dieterle v. Bekin*, 143 Cal. 683, 77 Pac. 664. And where receipt for storage of apples recited "at owner's risk," held warehouseman not excused for negligence by failing to protect from unusually cold weather. *Denver, etc. Co. v. Munger*, 20 Colo. App. 56, 77 Pac. 5; *Rudell v. Grand Rapids, etc. Co.*, 136 Mich. 528, 99 N. W. 756.

was occasioned by some of the acts which would excuse a bailee, as, for example, the act of God, the public enemy or inevitable accident. Some of the courts have held that this would not be a complete defense, but that the defendant bailee would be required to further show that he exercised reasonable diligence in endeavoring to prevent the loss or injury; while others contend that the burden of proving negligence never shifts from the plaintiff.

In *Lynch v. Kluber*<sup>72</sup> it was held that warehousemen are held to the same degree of care which prudent persons usually take of their own property, and proof that property was delivered to a warehouseman in good condition, and was damaged when returned by him, makes out a *prima facie* case of negligence against him. In *Parry v. Squire*<sup>73</sup> it was held that "evidence that the property was in good condition, and that it was not in such good condition when redelivered by him, makes a *prima facie* case against him."

§ 204. The question summed up and the rule settled.—The question as to the burden of proof seems to be settled in the opinion of the court in the case of *Clafin v. Meyer*,<sup>74</sup> which held that where there is a failure to account for the property or its injury, and a demand and an unexplained refusal to deliver is proven, a *prima facie* case of negligence is made out; but when the loss or injury is accounted for as having been occasioned by some of the causes which excuse the bailee then the defense is complete unless the plaintiff further shows that the bailee by exercising ordinary diligence might have avoided the loss or injury; that the burden of proving negligence never shifts from the plaintiff. In that case the goods were lost by a burglary. The court say: "Upon its appearing that the goods were lost by a burglary committed upon the defendants' warehouse, it was for the plaintiffs to establish affirmatively that such burglary was occasioned or was not prevented by reason of some negligence or omission of due care on the part of the warehouseman.

"The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such non-delivery, or, to use the language of Suther-

<sup>72</sup> 46 N. Y. Supp. 428.<sup>73</sup> 79 Ill. App. 324.<sup>74</sup> 75 N. Y. 262.

land, J., in *Schmidt v. Blood*,<sup>75</sup> where there is a total default in delivering or accounting for the goods, this is to be treated as *prima facie* evidence of negligence. This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

"But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume, in the absence of proof on the point, that such fire or theft was the result of his negligence. Grover, J., in *Lamb v. Camden & Amboy R. Co.*,<sup>76</sup> says, in delivering the opinion of the court, the question is 'whether the defendant was bound to go further (i. e., than showing the loss by fire) and show that it and its employees were free from negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiffs, to maintain the action, to prove that the fire causing the loss resulted from such negligence.' And he proceeds to show that the charge of the judge who tried the cause gave to the jury the former instruction and that this was contrary to the law and erroneous. So Sutherland, J., in 9 Wend. (*supra*), in the case of a warehouseman, says: The *onus* of showing the negligence 'seems to be upon the plaintiff unless there is a total default in delivery or accounting for the goods.' And he cites a note of Judge Cowen to his report of *Platt v. Hibbard*,<sup>77</sup> in which that very learned author says, criticising and questioning a charge of the circuit judge, 'the distinction would seem to be that when there is a total default to deliver the goods bailed on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use and trover will lie;<sup>78</sup> but when he has shown a loss, or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff.

"It will be seen, as the result of these authorities, that the

<sup>75</sup> 9 Wend. 268.

<sup>76</sup> 46 N. Y. 271.

<sup>77</sup> 7 Cow. 500.

<sup>78</sup> Anonymous, 2 Salk. 655.

burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real 'shifting' of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff must in all cases, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman, and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.

"Applying these principles to the present case, we must hold that when it appeared, as it did, that the goods were taken from the defendant's warehouse by a burglarious entry thereof, the plaintiffs should have shown that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted or contributed to cause or permit that burglary."<sup>79</sup>

<sup>79</sup> *Clafin v. Meyer*, 75 N. Y. 262; *Fairfax v. Railway Co.*, 67 N. Y. 11; *Steers v. Liverpool Steamship Co.*, 57 N. Y. 1; *Burnell v. Railway Co.*, 45 N. Y. 184; *Knight v. Piella*, 111 Mich. 9. If property is lost, or returned in an injured condition, the burden of proof is on bailee to overcome the presumption of negligence; but if he shows it was occasioned by operation of forces not within his control, the case is at an end, unless the ballor either disproves the asserted causes of loss or injury or shows that want of ordinary care co-operated with such de-

stroying cause. *McLaughlin v. New York Lighterage Co.*, 27 N. Y. S. 248; *Hunter v. Ricke Bros.*, 127 Iowa, 108, 102 N. W. 826; *Shropshire v. Sidebottom*, 30 Mont. 406, 76 Pac. 941; *Powers v. Jughardt*, 91 N. Y. S. 556; *Simonoff v. Fox*, 91 N. Y. S. 757; *Jackson v. McNonald*, 70 N. J. 594, 57 Atl. 126. But see *Winteringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999; *Selesky v. Vallmer*, 95 N. Y. S. 130. In *Willett v. Rich*, 142 Mass. 356, held burden of proof does not shift. And it was held not necessary in order to recover against a cold storage company, for dam-

§ 205. **Contributory negligence.**—While it is true that the bailee must answer for his ordinary negligence, and that it extends to requiring him to use ordinary diligence in avoiding loss or injury of the property by any of the causes that excuse loss or injury, there is in all such cases certain duties resting upon the bailor.

Contributory negligence as a defense is applicable to cases of bailments, and whenever it can be shown that the bailor himself contributes to the negligence that occasioned the loss or injury, he cannot recover in an action against the bailee. In *Parker v. Union Ice & Salt Co.*,<sup>80</sup> it was held "that damages are not recoverable from a warehouseman, a bailee for hire, because of injury to goods stored through the unfitness of the warehouse as a place of storage, where the bailor has equal opportunities with the bailee of knowing whether his goods are liable to injury by storage in an unsuitable place. The court say: 'From the above facts the court concluded' (the court below), 'as a matter of law, that, the parties being equally negligent, no recovery could be had.' The conclusion of the court was sound. The ordinary rules of liability for negligence and contributory negligence obtain in cases of bailment such as the one in question. A bailor who knows the unfitness of the place of storage of goods provided by his bailee, or who has equal opportunities with the bailee of knowing it, who sees and inspects the place of storage, and who—there being no latent defects in it—passes judgment upon it as a fit place for his purposes, will be deemed equally at fault with the bailee if damage result to his goods." The principle has been generally recognized as applying to cases of liability of a bailee.<sup>81</sup>

ages to goods, to prove more than that the goods when delivered for storage were according to the usual test of commerce sound. *Marks v. New Orleans, etc. Co.*, 107 La. 172, 57 L. R. A. 271. And where an action was brought against a warehouseman for loss of liquor stored, the bailee showed that the loss occurred by leakage, held that the burden of proof of negligence of the bailee in the matter was on the bailor. *Tansig v. Bode & Haslett*, 134 Cal.

260, 54 L. R. A. 774. Goods received in good condition returned damaged *prima facie* evidence of negligence. *Holt, etc. Co. v. Arthur Jordon Co.*, 25 Ind. App. 314, 57 N. E. 575. See cases cited in notes to *Sulpho, etc. Co. v. Allen*, 1 Am. & Eng. Ann. Cas. 23.

<sup>80</sup> 59 Kan. 626, 54 Pac. 672.

<sup>81</sup> Defendant's customer, without his request or notice to him, placed her jacket over her purse on a table in a fitting-room in his tailoring establishment, and then

In the case of *Schnips v. Strum*,<sup>82</sup> defendant kept a bath tank and charged five cents for a bath; he supplied no lockers, and his patrons deposited their clothing on a bench near the tank. When requested he would receive from his customers such articles as they wished particular care taken of. While plaintiff, who was a regular customer, was bathing, a watch, a diamond ring and \$55 were stolen from his clothes on the bench. He had not availed himself of the privilege of depositing these valuable articles with the proprietor. The court say: "The defendant's duty was measured by what he undertook to do. The accommodations he afforded and the extent of protection which he gave were all known to those who frequented his place, and in accepting what was offered they must be deemed to have been satisfied with it. It was that and that alone which they paid for, and the measure of the defendant's obligation to them was the careful observance of that which the facts show he assumed to perform." . . . "We think also that the plaintiff was guilty of contributory negligence in placing his valuables in such an exposed place, and in not depositing them with the defendant for safe keeping as he had previously done." . . . "Having failed to avail himself of a means of protection afforded by the defendant, which ordinary prudence required him to adopt, he was himself guilty of negligence which in itself was sufficient to bar a recovery."<sup>83</sup>

**§ 206. Negligence of servants.**—The general rule, making the master liable for the acts of servants while acting within the scope of their employment, obtains here, and for the same reason. The right of selection is the foundation of the rule. The master has the right to choose his servants, and must choose those upon whom he may depend. If the master has not the right to choose, he may not be held responsible for the servant's acts; and, indeed, the relation of master and servant cannot be said to

left the room until notified to return by his forewoman. In the meantime the purse was stolen. Held, that the customer's negligence precluded a recovery. *McAllister v. Simon*, 57 N. Y. S. 733.

<sup>82</sup> 54 N. Y. Supp. 140.

<sup>83</sup> "When the bailor, or depositor, not only knows the general character and habits of the bailee

or depositary, but the place where and the manner in which the goods deposited are to be kept by him he must be presumed to assent in advance that his goods shall be thus treated; and if under such circumstances they are damaged or lost, it is by reason of his own fault or folly." *Knowles v. Atlantic & St. L. R. Co.*, 38 Me. 55.

exist if the right of choice does not exist.<sup>84</sup> But the relation of master and servant existing, it follows that the master is liable for the negligence of the servant while acting within the scope of the employment, and for the reasons above stated.

This rule applies to corporations as well as individuals.<sup>85</sup> It therefore follows that the custodian bailee is liable for the acts and for the negligence of his servants. The warehouseman, the elevator man, the safe-deposit company, the common carrier, the wharfinger, the storage company and all those engaged in the business of caring for the property and giving custody for hire, are subject to this rule of law.

§ 207. **Unauthorized use of chattels.**—This subject has been quite sufficiently discussed under another head.<sup>86</sup> It may remain, however, to be said that the rule applies to custody bailments the same as to any other class of bailments. The bailee has no right to use the property that is placed in his care and custody for keeping; or to use it in any way not consistent with the bailment relation; and should he at any time be guilty of using the chattels for his own benefit, and in violation of the bailment relation, it would terminate the bailment.

§ 208. **Delivery, misdelivery, non-delivery.**—The bailee who for hire has the chattels for safe keeping in his custody must, at the termination of the bailment, return the goods; it may be that the bailment contract, by express stipulation or by implication, does not provide or contemplate the return of the specific articles bailed, as in case of wheat stored with the elevator-man with the implied understanding that the particular wheat will be stored in large bins with other wheat, and that the bailment will be fully answered as to all its requirements by returning other wheat of the same kind, quality and quantity; or where wheat is stored with the miller to be returned in flour as called

<sup>84</sup> *Hexamer v. Webb*, 101 N. Y. 377, held: "In order to establish the liability of one person for an injury caused by the negligence of another, it is not enough to show that the latter was at the time acting under employment by the former; it must be shown in addition that the employment created the relation of master and servant." *King v. N. Y. etc. R.*

*Co.*, 66 N. Y. 181; *Kimball v. Cushman*, 103 Mass. 194; *Pickens v. Diecker*, 21 Ohio St. 212; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 604.

<sup>85</sup> *Frankfort Bank v. Johnson*, 24 Me. 490; *Muster v. Chicago, M. & St. P. Ry. Co.*, 61 Wis. 325; *Kimball v. Cushman*, 103 Mass. 194.

<sup>86</sup> *Ante*, § 46.



for. But in every case of this class of bailments, redelivery in some form is contemplated, and it is the duty of the bailee to see that there is such a redelivery as the bailment contract requires. Nor can he dispute the bailor's title except at his own risk, or require of him, before redelivery, proof of the property bailed.<sup>87</sup>

Not only is the bailee required to deliver the goods he has had in his custody to the bailor at the termination of the bailment, but for a misdelivery, whether by mistake or negligence, he will be liable in trover; for mistake or negligence in the performance of this duty which renders it impossible for him to deliver the property, he will be held accountable the same as though he had converted the property to his own use.<sup>88</sup> He will be held to know who his bailor is, and can have no legal reason for making a mistake in delivery.

§ 209. *Confusion of goods.*—As has been seen, the contract of bailment, often by express terms or by implication, provides that the chattel bailed, as wheat or corn, may be mixed with other property of the same kind and quality, and that the bailment can be satisfied by a redelivery of the same quality from the common mass. The obligation is, however, always upon the bailee, unless acting by the direction of the bailor, to see to it that the objects and contract restrictions of the bailment are fully adhered to, and if he fails in this he becomes liable.

§ 210. *Criminal liability.*—The bailee in this class of bailments holds the property for no other purpose than to care for it during the continuance of the relation in accordance with the contract, and redeliver it to the bailor upon the termination of the relation. He has no title to the property except that possessory interest given him as bailee, and his right to the possession ceases whenever he is guilty of fraud or bad faith, or any misuse of the property. The relation is such that should the bailee, with intent to deprive the bailor of his property, and without his consent, convert the same to his own use, he would be guilty of embezzlement.

Embezzlement is said to be a species of larceny, and the term is applicable to cases of stealing by agents, clerks, or carriers, of property coming into their possession by virtue of their employment.<sup>89</sup>

<sup>87</sup> *McCafferty v. Brady* (Pa.), 9 Atl. 37.

*v. Doyle*, 91 N. Y. 32; *Collins v. Burns*, 63 N. Y. 1.

<sup>88</sup> *Lichtenheim v. Boston P. R. Co.*, 11 Cush. 70; *Bank of Oswego*

<sup>89</sup> *Sykes v. The People*, 127 Ill. 117.

It will not be necessary to discuss *in extenso* this question, as it belongs more properly to a treatise on criminal law. In many of the states, however, special statutes have been enacted relating to warehousemen and like bailees. These statutes are somewhat sweeping in their provisions, generally requiring the issuing of a receipt for the property stored to the bailor, which must bear the date of its issuance, must state from whom, and the amount received, condition, quality, etc., and the terms and conditions of the bailment; that no receipt shall be issued for property not actually stored; that no person operating any warehouse shall sell, incumber, ship, transfer, or in any manner remove, or permit to be shipped, transferred, or removed beyond his custody and control, any grain, etc., for which a receipt has been given by him, whether received for storage, shipping, grinding, manufacturing, or other purposes, without the written assent of the holder of the receipt, and providing punishment for any violation of these provisions. In *Sykes v. People*,<sup>90</sup> the Illinois court discussed a similar statute. The court say: "It cannot be doubted that commercial transactions are greatly facilitated by this transfer of property, and the purpose of the act was to protect the holders of such public warehouse receipts from imposition and fraud. The receipts are required to be the true representatives of property actually in store in the warehouse, and their issuance is prohibited under any other conditions or circumstances. If the bank, in this case, as it might, had put these warehouse receipts in circulation, an actual fraud would have been committed, and the evil intended to be prevented by the statute consummated. By the issuance of the receipts to the bank, it was furnished with the means of perpetrating a fraud, and this is one of the objects this statute sought to prevent. Any other construction would open the door to unlimited fraud, and render nugatory the protection attempted to be afforded to transactions through the public warehouses of the state by the statute.

"It follows that, as touching the question of the guilt or innocence of the defendant, the intent with which the receipts were issued by him was immaterial. The intent necessary to

<sup>90</sup> 127 Ill. 117; *McCutcheon v. People*, 69 Ill. 601; *State v. Morse*, 52 Iowa, 509.

be found, to constitute this offense, related alone to whether defendant intended to issue the receipt knowing it to be false. Thus far the common-law doctrine, that every criminal offense consists of the joint operation of act and intent, enters into and must be considered as applying to statutory offenses.<sup>91</sup>

"If such receipts were issued by the defendant, he knowing that the property therein represented was not in fact in store as therein designated and described, the crime created by this section of the statute, as it relates to the issuance of such receipts, was committed. As before stated, it is immaterial whether the defendant intended a fraud upon the bank or other persons, if in fact his act knowingly committed was within the prohibition of the statute."

§ 211. Termination.—The letting of custody for hire being the object of this class of bailments, it will be seen that the relation can be terminated at the will of the bailor, and by paying for the custody. So the bailee must at all times upon reasonable demand and notice be ready to deliver the property, for the purpose of the bailment has then been accomplished.

The relation may also be terminated in the several ways that have already been discussed, as (a) by operation of law, as where the bailee becomes the owner of the property, by death of the parties, unless it be of such a nature that the personal representatives can carry out the bailment; (b) by loss or destruction of the property, when there could no longer be any

<sup>91</sup> Bishop's Statutory Crimes, 351-361; *Gardner v. People*, 62 N. Y. 299; *Halsted v. State*, 41 N. J. L. 552. The supreme court of Iowa, in *State v. Stevenson*, 52 Iowa, 701, held that where a warehouseman shipped grain out of his control, for which he had given a receipt, leaving the receipt outstanding, he was criminally liable under a similar statute, although the grain was so shipped with the knowledge and without objection by the holder of the receipt. The court said: "It is evident from this whole section that it is for the protection of the community as well as the protection of the

holder of the voucher. It is clear that Petrie (such holder), in this case, with the receipt in his possession, might perpetrate a fraud upon third parties, the grain not being stored with the defendant as stated in the receipt. The defendant could not innocently, under the statute, with such a receipt outstanding, ship the wheat beyond his control, even in the presence of Petrie and with his verbal assent. Such an act would furnish Petrie the means of perpetrating a fraud, which it is one of the objects of the statute to prevent."

subject of the bailment; (c) by mutual consent; and (d) by the wrongful acts of the bailee, as by misuse of the property or neglect to give it proper care.<sup>92</sup>

§ 212. **Conversion.**—It is not necessary to again discuss the question of conversion, it having already been sufficiently treated.<sup>93</sup>

§ 213. **Compensation—Lien.**—This bailment is one of the hiring bailments, and the bailee, for the custody and care bestowed, is entitled to compensation. This compensation is usually fixed by the contract, from usage and custom well understood, or by the reasonable charges of the bailee. For the payment of this compensation the bailee has a common-law lien upon the subject of the bailment.<sup>94</sup> This lien is a special lien and not a general one; a lien upon the goods or property that he has cared for—that have been and are within his control.

The general principles governing this lien have been so fully stated that we will not again discuss them.

§ 214. **Actions against the warehouseman.**—The duties and obligations of the warehouseman are well defined, as is also the ordinary diligence that it is incumbent upon him as a mutual benefit bailee to exercise. By implied contract he undertakes to receive the chattels or property for custody and in caring for it to exercise that degree of care which other persons engaged in a similar business in the same vicinity are in the habit of exercising in caring for the same kind of property similarly situated.<sup>95</sup>

<sup>92</sup> In *Cobb v. Wallace*, 5 Cold. (Tenn.) 539, the court held that the bailee is bound to return the property upon reasonable notice. *Bailey v. Colby*, 34 N. H. 29. That sale by bailee terminates. *Dunlap v. Gleason*, 16 Mich. 158; *Negus v. Simpson*, 99 Mass. 388; *Morse v. Crawford*, 17 Vt. 499. Property removed by operation of law. *Wheeler & Wilson, etc. Co. v. Brookfield*, 70 N. J. 703, 58 Atl. 352; *Cornell v. Mahoney*, 190 Mass. 265, 76 N. E. 664.

<sup>93</sup> *Ante*, § 63.

<sup>94</sup> Warehousemen have a common-law lien on the goods stored with them. *Reefe v. Brackett*,

109 Ill. App. 631; *Gerold v. Guttle*, 106 Ill. App. 630; *Kaufman v. Leonard*, 139 Mich. 104, 102 N. W. 632. May hold property till compensation paid. *Reidenbach v. Tuck*, 88 N. Y. S. 366. Under New York statute held keeper of a garage had no lien on an automobile which owner used at his pleasure. *Smith v. O'Brien*, 94 N. Y. S. 673, 46 Misc. Rep. 325.

<sup>95</sup> *Cass v. Boston, etc. R. Co.*, 14 Allen (Mass.), 448. Such diligence as faithful warehousemen are accustomed to give in like circumstances. *Louisville, etc. R. Co. v. United States*, 39 Ct. Cl. 405; *Charlotte, etc. Co. v. Sea-*

Failure to faithfully exercise his duty in respect to the property will subject him to an action. The actions that may be brought for dereliction of duty are numerous as is apparent from our former discussion but whatever the action and upon whatever ground it rests the important question decisive of the right to recover generally rests upon the diligence or negligence of the warehouseman, and as has been shown where the goods are not redelivered but are lost or are returned in a damaged condition, the burden of accounting for the loss or damage is upon the warehouseman and this involves the showing that he was not negligent but diligent to the degree required of him. If the damage or destruction resulted without his fault and was occasioned by the act of God or the public enemy there is no difficulty, but if from robbery or other causes it is sometimes difficult to prove that he was negligent for often it is hardly enough to leave the case to a jury on proof of the fact alone of what was done by way of protecting the property, but further proof must be made, for the additional question involved is, did the warehouseman exercise the degree of care which others engaged in the same or similar business in the vicinity usually bestow on such like property. In *Cass v. Boston, etc., R. Co.*<sup>96</sup> this question was involved. After stating what might constitute a defense, the court say: "What constitutes such care was a question of fact to be judged of with reference to all the circumstances, and especially with reference to the degree of care which other persons engaged in similar business in the vicinity, were in the habit of bestowing on property similarly situated. . . . The defendant offered to prove that there was exercised by it in relation to this property, that care which other railroad corporations in Boston (the place of the accident) usually exercised in relation to such property." This was held proper proof. But it has been held that this kind of proof must relate to a class rather than to an individual person or corporation. What would be considered in such cases by the general class of warehousemen to be diligence or negligence.<sup>97</sup>

board, etc. Ry., 139 N. C. 382, 51 S. E. 973; *Denver, etc. Co. v. Munger*, 20 Colo. App. 56, 77 Pac. 5.

<sup>96</sup> 14 Allen (Mass.), 448; *Lichtenstein v. Jarvis*, 164 N. Y. 601, 59 N. E. 125.

<sup>97</sup> *First Nat. Bank v. Graham*, 79 Pa. St. 106, 21 Am. Rep. 49, where it was said: "But the question of the bailee's responsibility must be finally settled by a resort to the settled principle which

The general rule governing liability of the master for negligence of his servants applies in actions against warehousemen where the negligence of his servants occasioned the loss or injury for which the action is brought.

In *Aldrich v. Boston, etc., Co.*<sup>98</sup> the court say: "The legal obligation of the defendants as warehousemen is well settled. . . . They were not chargeable with the negligence of any of their servants unless it was negligence within the scope of the servants' employment, and a true test of this liability may be found in the question whether any one of the defendant's servants who were present at the fire would be answerable to his employers for a neglect of his duty." The action against the warehouseman may also arise because of his failure to observe the contract of storage, as to the place or kind of building the goods were to be stored in. If there was no knowledge or consent on the part of the bailor as to the place of storage, the warehouseman would be bound to ordinary diligence in furnishing a fit place.<sup>99</sup> If stored in a different place than stipulated for in the contract or impliedly agreed upon, proof of this and that the goods were destroyed would render the warehouseman liable, and it would be no defense that the destruction or loss was occasioned by the act of God, the public enemy or inevitable accident, without his fault. As tending to show an understanding or an implied agreement to store the property in a particular place, the advertisements, receipts or declarations of the warehouseman may be introduced in evidence.<sup>100a</sup>

deduces the measure of his duty in each particular bailment, from a comparison of his conduct with the conduct, not of individuals, but of classes of men."

<sup>98</sup> 100 Mass. 31, 32, 1 Am. Rep. 76.

<sup>99</sup> Putting prunes in bins where other fruit was in bad condition held to be negligence. *Arnold v. Producers' Fruit Co.*, 128 Cal. 637 61 Pac. 283; *Rudell v. Grand Rapids, etc. Co.*, 136 Mich. 528.

<sup>100a</sup> *Abbott's Trial Evidence*, 562,

and cases cited; *Rettner v. Minnesota, etc. Co.*, 88 Minn. 352, 354, 93 N. W. 120. Evidence as showing stored at different place. *Kennedy v. Putman*, 97 Mo. App. 253, 70 S. W. 1099. In *Toplitz v. Timmins*, 88 N. Y. S. 946, in an action against a warehouseman for failure to redeliver goods it was held that a showing of the agreement for storage and the delivery of the goods and evidence showing a failure to redeliver makes a *prima facie* case of negligence.



## PART SECOND

### PLEDGE OR PAWN

#### CHAPTER I.

##### THE RELATION.

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| <p>§ 215. <i>Pignus</i>.<br/>         216. The scope of the business.<br/>         217. Definition.<br/>         218. Some essentials.<br/>         219. Competent parties.<br/>         220. There must be assent of the parties.<br/>         221. Title of the property—Authority to pledge.<br/>         222. Corporations—Partnerships—Agencies.<br/>         223. Property the subject of the pledge.<br/>         224. Corporeal or incorporeal.<br/>         225. Property not in existence or acquired.<br/>         226. Exceptions.<br/>         227. Exempt property may be pledged.<br/>         228. Pensions and pay to officers and soldiers.<br/>         229. The debt or engagement.<br/>         230. Pledge as collateral security.<br/>         231. — Contract should specify debt secured.<br/>         232. — Pledge may be to se-</p> | <p>cure past, present or future indebtedness.<br/>         233. — The pledgor may pledge his property to secure the debt of another.<br/>         234. — As to holding property for former or another debt.<br/>         235. — Continuing security—Future transactions.<br/>         236. — When several debts—Applications of payment.<br/>         237. — A pledge which secures a debt bearing interest secures the interest as well as the debt.<br/>         237a. Delivery of the property by the pledgor—Acceptance and continued possession of the property by the pledgee.<br/>         238. If property not delivered—Pledge, when good.<br/>         239. The delivery.<br/>         240. Constructive or symbolic delivery.</p> |
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§ 215. *Pignus*.—This class of bailments belongs to the general class of benefit bailments, that is, bailments for the benefit of both parties, and to the Roman classification called *pignus*.

*Pignus* is a Latin word and signifies pledge; the deposit of the thing, or the transfer of the possession of it, or dominion



over it as security for the performance of an obligation. "The essential idea in the Roman and civil law is the putting of property, whether of a chattel or land, or territorial jurisdiction (or servants or children when they are regarded as property), under the hand of the creditor or pledgee as security, so that, although the right of the owner was not extinguished, the creditor or pledgee could enforce his claim without legal proceedings, or no effort to gain possession; and this is also the essential idea in *pawn* and also in the strict use of pledge; while *hypothec* and mortgage imply that the owner retains possession and that the creditor has only the right of action, or a right to demand possession in the contingencies agreed on."<sup>1</sup>

It is suggested by some of the writers upon this subject that a pledge is of more modern application, and has a different and broader significance than the term "pawn," or the business of pawning; that at an early day the business was not known by the term "pledge," but was rather confined to that of pawning of personal effects, and did not embrace the larger transactions of modern business, but was limited to the personal pawning of personal articles of adornment and use. It is true the subject generally suggests the three golden balls and a show window of some little office filled with jewelry, watches, diamonds, bank-bills, gold and silver money displayed to lure the poor unfortunate who must realize a small sum, to step inside and leave what valuables he has left, and take away a pittance at a large rate of interest.

But to-day this a very small part of the business embraced by the subject we have in hand. Year by year has added to the great volume of business that is now included in this class of bailments. As the business world has advanced, as the age of invention and improvement has more or less taken possession of the pecuniary interests of mankind, larger demands have been made and met along the line of loans and securities, and from the once small and somewhat unpopular business of the pawnbroker a new and larger business has emanated, taking on new and more respectable habiliments. And while the same golden balls allure the unfortunate to deposit his few personal jewels and adornments, this other and more respected business has grown into existence and flourishes under a different name, and is patronized by larger business interests. Now

<sup>1</sup> Century Dictionary.

we have not only the pawnbroker, but the loan and security companies, bank and trust companies, rich corporations and individuals who become pledgees, holding the personal chattels of individual business men and as well of great corporations, so that the relation of pledge and pawn has come to be an important factor in the modern business world.

§ 216. **The scope of the business.**—The scope of the business can hardly be described. Beside the little pawn shop which deals in the few little parcels of property, with but a small amount of capital invested, may be found the banking house of immense capital, holding within its vaults, as security for its immense loans, bonds and securities of great amount and value, so that the relation of pledge and pawn embraces a large scope and variety of business and business relations. Not only is it confined to the public institutions like pawnbrokers' offices, the banking institutions, the loan and security companies, but it also embraces a large amount of private transactions where, property is left by one individual with another as security for the payment of his debt, or for the performing of his obligation.

§ 217. **Definition.**—A pledge or pawn may be defined to be a bailment of personal property as security for the payment of a debt or the performing of an obligation.<sup>2</sup> Lord Holt<sup>3</sup> defines it: "When goods or chattels are delivered to another as a pawn to be security for money borrowed of him by the bailor." Sir William Jones<sup>4</sup> defines a pledge to be "a bailment of goods by a debtor to his creditor to be kept till the debt is discharged."

§ 218. **Some essentials.**—From the definition itself it will be observed that there are certain essentials to a pledge or pawn, which from the very nature of the relation are indispensable.

- (1) There must be competent parties.
- (2) Property the subject of the pledge or bailment.
- (3) A debt or engagement.
- (4) Delivery of the property by the pledgor; and
- (5) Acceptance and continued possession of the property by the pledgee.

<sup>2</sup>In *Farsan v. Gilbert*, 114 Ill. App. 17, it is defined to be a lien created by the owner of personal property by the mere delivery of it to another upon an express or implied understanding that it shall be retained as security on an ex-

isting or future debt. *Harding v. Eldridge*, 186 Mass. 39, 71 N. E. 115.

<sup>3</sup>*Coggs v. Bernard*, 2 Lord Raymond, 909-913.

<sup>4</sup>Jones, *Bailments*, sec. 35.

§ 219. **Competent parties.**—The relation is one of contract, and so the requirements as to competency of parties are the same as in contracts. The parties must be competent to enter into a contract relation, and the same disabilities that preclude certain persons from becoming parties to a contract apply to their assuming this relation.

At common law, infants, married women, lunatics, drunkards and idiots were held to be incompetent to enter into contract relations; but while the general rule would exclude these classes, there are exceptions to this rule. As, for example, infants may be allowed to contract for necessities; and so may married women;<sup>5</sup> a drunkard when not so much under the influence of intoxicants as to deprive him of his competency to do business; a lunatic while enjoying a lucid interval. And statutes of the states generally, have given to married women the right to deal with their own separate property and to make contracts with reference to it. This right would include contracts for the pledging of the same, but in such case it would be necessary to show that the contract of pledging was with reference to her separate property.

All this has been discussed in a former chapter,<sup>6</sup> and it will not be necessary to here repeat it.

§ 220. **There must be assent of the parties.**—It goes without saying that a contract, either express or implied, to be valid, must be entered into by consent of the parties; and if such consent cannot be legally shown, there can be no pledge; and if consent is obtained by fraud, or duress, or misrepresentation, it will vitiate the contract and the pledge will not be binding upon the parties.

In the case of *Mead v. Bunn*<sup>7</sup> it was held that a pledge obtained by fraudulent false representation was void, and though unredeemed by the debtor it vested no interest in the pledgee; that it was void in the law. "Every contracting party has an absolute right to rely upon the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement.

A contract obtained by fraud, though perfect in form, is

<sup>5</sup> *Campbell v. White*, 22 Mich. 178; *Chamber of Commerce v. Goodman*, 110 Mich. 501, and cases cited.

<sup>6</sup> *Ante*, §§ 13-16.

<sup>7</sup> 32 N. Y. 275.

void in law; the element of fair and free consent is essential to the validity of every mutual engagement. The homely maxim 'honesty is the best policy' is nowhere more firmly rooted and grounded than in the foundation of our civil jurisprudence. No man can safely rest on a title acquired through his own deliberate wrong." . . . "It is not necessary to consider the question whether the extortionate terms of the pledge rendered it void as *contra bonos mores*, and opposed to public policy, for the agreement was fatally tainted in its inception, and it was no sooner concluded between the parties than it was annulled by operation of law." The maxim that fraud "vitiate all contracts" is applicable here.

§ 221. Title of the property—Authority to pledge.—As a general rule to create a valid pledge the pledgor should be the owner of the property pledged, or be duly authorized by the owner to create the pledge. But if a pledge is made and the property delivered to the pledgee by one having neither title to the property or authority to pledge it, the pledge will be binding between the parties to it and upon all the world, except the lawful owner; for by the act of pledging the property the pledgor impliedly warrants that he has the title and is able to create a valid pledge.<sup>8</sup> And where one having no title to the property or authority to pledge it undertakes to create a pledge of it and in pursuance thereof delivers it to the pledgee, he will be estopped from setting up the title afterwards and during the continuance of such pledge acquired, to defeat it; the title thus obtained would enure to the benefit of the pledge, and the pledgee through it could sustain his right to possession, not only against the pledgor, but against any others claiming under him. And where the owner of the property carelessly or otherwise so intrusts the property to another as to lead a reasonably prudent man to believe that he has the title to it or the authority to pledge it, even though the title was not transferred and no authority conferred, if the property is by reason of this wrongfully pledged, a *bona fide* pledgee of the same for value will be protected, upon the theory that as between two innocent parties the one who has made it possible for the wrong to be committed must suffer.<sup>9</sup> But if the possession of goods were obtained feloniously, as for example were stolen by the bailor, a *bona*

<sup>8</sup> *Mairs v. Taylor*, 40 Pa. St. 446;  
<sup>9</sup> *Goldstein v. Hort*, 30 Cal. 372.

<sup>9</sup> *Western Union R. Co. v. Wagner*, 65 Ill. 197.

*fide* pledgee as against the owner could obtain no right to the property. There is a well settled distinction between the cases of possession of goods obtained by felony and possession of goods obtained by fraud. If the possession is obtained by felony the owner may recover his property from whomsoever it has been delivered although the holder be a *bona fide* pledgee, but if the pledgor has obtained the property by fraud and while in his possession it is pledged to a *bona fide* pledgee who has no notice of the fraud, the right and title of such *bona fide* pledgee cannot be defeated.<sup>10</sup>

§ 222. **Corporations, partnerships, agencies.**—A corporation being a legal entity capable of holding and owning property, recognized in the law as a person, may be a valid party to a pledge as pledgor or pledgee whenever the transaction is within the scope of its corporate authority. So a partnership being recognized in the law as a concern able to do business, to own and possess property, is competent to be either a pledgor or a pledgee of property whenever the pledge is made within the scope of the partnership authority. If, however, the property should be pledged, though generally within the scope of the business of the concern, if it should appear that it was an unusual proceeding, it would be looked upon by the court with some degree of suspicion. The pledge must be for the benefit of the concern; that is, for the corporation or co-partnership; and if it should appear that it was pledged to secure the individual indebtedness of one of the partners, or of one of the directors of the corporation, it would be held void as against the creditors of the concern. Such action would be beyond the scope of the authority of a partner or individual member of a corporation.

An agent may, acting within the scope of his authority, make his principal, if the principal is competent to be a party to

<sup>10</sup> But if the goods have been stolen and then pledged the pledgee will have no lien upon them as against the owner. *Aron-dale v. Morgan*, 5 Sneed (Tenn.), 703; *Wood v. Yeatman*, 15 B. Mon. (Ky.), 270; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Jarvis v. Rogers*, 15 Mass. 389; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285. If

the pledgee has notice of the fraud his pledge will not be protected. *Merchants', etc. Bank v. Masonic Hall*, 62 Ga. 271; *Hamsted, etc. Co. v. Chapman*, 81 N. Y. S. 38 80 App. Div. 556. Where a loan was made in good faith. *Freeman v. Bristol Sav. Bank*, 76 Conn. 212, 56 Atl. 527.

the relation, either a pledgor or pledgee, as the particular business may demand; but here the rules of agency will be invoked—the agent must have authority to act in that regard. If he is a general agent, and it is along the line of his duty as such general agent, he would not need to have special authorization from the principal. The maxim that obtains in the law of agency obtains here: *Qui facit per alium facit per se*.

§ 223. **Property the subject of the pledge.**—Every kind of personal property, whether corporeal or incorporeal, if capable of transfer by delivery of the thing itself, or by assignment of the evidence of ownership, may be the subject of the pledge or pawn. The property must be personalty; real property cannot be the subject of a pledge.

§ 224. **Corporeal or incorporeal.**—Formerly the relation of pledge or pawn was confined to corporeal personalty, as articles of jewelry, wearing apparel, domestic animals, and such like personal property, and did not include personalty that is ordinarily denominated and known as incorporeal personalty, such as shares of stock, debts, negotiable and non-negotiable paper, choses in action, and the like. The courts proceeded upon the theory that such property could not be delivered in the way the law required property to be delivered in order to create a pledge.

In the case of *Wilson v. Little*<sup>11</sup> this question was discussed, and the court there announced the doctrine, which has been the doctrine ever since, that incorporeal personalty may be the subject of a pledge. In that case the court say: “The argument of the defendant in this case is founded on the assumption that when personal things are pledged for the payment of a debt, the general property and the legal title always remain in the pledgor; and that in all cases where the legal title is transferred to the creditor the transaction is a mortgage and not a pledge. This, however, is not invariably true. But it is true that possession must uniformly accompany a pledge. The right of the pledgee cannot otherwise be consummated. And on this ground it has been doubted whether incorporeal things like debts, money in stocks, etc., which cannot be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any

<sup>11</sup> 2 N. Y. 443.

legal or equitable interest whatever in personal property may not be pledged, provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And so debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge."

In *Stewart v. Lansing*<sup>12</sup> the subject of the pledge was coupon bonds issued by a township to a railroad company; and in *Penny v. Lynn*<sup>13</sup> it was a lease of real estate which was pledged as collateral security for the payment of a promissory note.

§ 225. **Property not in existence or not acquired.**—It is a general rule that property not in existence, or not yet acquired, cannot be the subject of a pledge, for the reason that it cannot be delivered by the pledgor to the pledgee, and delivery, as we shall see, is a requisite to a valid pledge. The courts, however, have held that where a contract to pledge has been made, and the contract cannot be carried out by reason of this general rule, the agreement would attach to the property as soon as it is produced or comes into the ownership or possession of the pledgor; and it may be said that in case of failure of the pledgor to carry out the contract to pledge, an action would lie for whatever damages the pledgee may have suffered by reason of it. This, however, is more in the nature of a contract to pledge, and can hardly be held to be a pledge in the full meaning and extent of that relation.<sup>14</sup>

§ 226. **Exceptions.**—But to the general rule above mentioned there are exceptions. Where property has a potential existence and the pledgor has a potential interest in it, it may be the subject of a pledge or pawn. It is not enough that the pledgor should have a mere possibility or expectancy of acquiring

<sup>12</sup> 104 U. S. 505.

<sup>13</sup> 58 Minn. 371, 59 N. W. 1043; *Morris Canal Co. v. Fisher*, 9 N. J. Eq. 667; *Schouler's Bailments*, sec. 172; *Green v. Sinker, Davis & Co.*, 135 Ind. 434, 35 N. E. 262, 16 Fed. 324.

<sup>14</sup> Pledge of uncut timber. *Nobels v. Christian, etc. Co.*, 113 Ala. 220. Property not in existence. *Waldie v. Doll*, 29 Cal. 555; *Macomber v. Parker*, 14 Pick. 497; *Smith v. Atkins*, 18 Vt. 461; *Goodnow v. Dunn*, 21 Me. 86.

the property; it must be a present interest in the property of which the thing pledged is the product, growth or increase. For example, the owner of a flock of sheep may pledge the wool to be grown on his sheep during the year, but he cannot pledge the wool to be grown upon the sheep of another person, or upon sheep which he expected to purchase, or of which he probably would come into possession. So the crops to be grown upon his own land may be the subject of a pledge by the pledgor, but not crops on the lands of another, unless the pledgor has a present interest in the land and the crop. This is upon the theory that in the natural course of events the property pledged will be produced as the property of the pledgor. As in the case of the wool to be grown upon the sheep owned by the pledgor, in the natural course of events the wool will grow and will be the property of the pledgor.<sup>15</sup>

<sup>15</sup> *Low v. Pew*, 108 Mass. 347; *Jones v. Richardson*, 10 Metc. 481; *Bellows v. Wells*, 36 Vt. 599; *Van Hoozer v. Corey*, 34 Barb. 9. In *Low v. Pew*, 108 Mass. 347, the court used this language: "It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. To be able to sell property he must have a vested right in it at the time of the sale. Thus, it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterwards acquires them, is void. *Jones v. Richardson*, 10 Met. 481. The same principle is applicable to all sales of personal property. *Rice v. Stone*, 1 Allen, 566, and cases cited; *Head v. Goodwin*, 37 Me. 181. It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential inter-

est in it within the meaning of this rule. The seller must have a present interest in the property of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus, a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest. The same principles have been applied by this court to the assignment of future wages or earnings. In *Muihall v. Quinn*, 1 Gray, 105, an assignment of future wages, there being no contract of service, was held invalid. In *Hartley v. Tapley*, 2 Gray, 565, it was held that, if a person is under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is, that in the former the future earnings are a mere possibility, coupled with no interest, while in



*Natural increase.*—The pledge of the property would carry with it the natural increase of the pledged property. As, for example, if the property were coupon bonds, the pledgee would have the right to collect the coupons as they matured, and apply the amount upon the indebtedness; or if it were a mortgage or note, to collect the interest upon them as it accrued; or if it were animals, the increase born during the time of the possession of the pledgee would be held subject to the pledge, and become a part of the pledged property; the rule being that “the increase follows its dam.”

§ 227. **Exempt property may be pledged.**—By the statutes of most of the states, if not of all, certain property is declared to be exempt from execution, and the courts have been very jealous of the rights given by reason of these exemptions; as, for example, the exempting of food and provisions sufficient to keep the family for six months, the two cows, the ten sheep, the team and vehicle for carrying on the business of the debtor if engaged in business requiring such property. These exemptions have been considered as humane and just. Of course the property exempted differs in different states; nevertheless the owner of this property is at liberty to dispose of it, and so may pledge it for debts; some of the states requiring, however, where it is pledged or mortgaged, that the instrument creating the pledge or mortgage shall be signed by the wife if the property is owned by a married man.

In *Frost v. Shaw*<sup>16</sup> the plaintiff commenced suit, claiming that

the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right. In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut, but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of or interest in the fish; and that the sale to the plaintiffs was void. The plaintiffs rely upon *Gardner v.*

*Hoeg*, 18 Pick. 168, and *Tripp v. Brownell*, 12 Cush. 376. In both of these cases it was held that the lay or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was, not of any part of the oil to be made, but of the debt under which the shipping articles would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action.”

<sup>16</sup> Ohio St. 270.

certain property sold was exempted by law from execution. The property had been pledged to secure the payment of a promissory note; default had been made in the payment, judgment was taken on the note, and the property levied upon and sold. In the opinion Bartlett, J., says: "Although the humane provisions of law exempting certain articles of necessity from execution for the payment of debts may be entitled to a liberal construction, the settled principles which govern the rights of private property are not to be overlooked. The owner of the chattels exempted from execution is not divested of the right of disposing of the property himself, either by sale or by pledge, in security for the payment of his debts, and in case of a pledge or a chattel mortgage the owner clearly waives the benefit of the exemption so far as the incumbrance extends or is operative."

§ 228. **Pensions and pay to officers and soldiers.**—From time immemorial it has been held by the courts, on the ground of public policy, that emoluments of officers and soldiers, including pensions to discharged soldiers, should be exempted from pledge, or pawn, or sale on execution.

The English courts afford many examples of the exemption of pay to officers, though in some cases they have held that by procedure in chancery the money might be reached. In an early case, *McCarthy v. Gould*,<sup>17</sup> the chancellor says: "It has been decided both at law and in equity that the half-pay of an officer is not assignable or attachable, on principles of public policy. In the case of *Stone v. Lidderdale*, the reason given was that he may be forthcoming when his services are required; but Lord Chief Baron McDonald, in his judgment, makes a distinction between the case of a half-pay officer and of a pension granted to an individual. In this case the grant of the pension was to Lord Westmeath and his assigns. He has assigned it to the defendant, who is in the receipt of it, and payment is made to him on his receipt. It is not a chose in action, but a grant, and may be reached by the process of this court, and the proper mode of effecting this is by restraining the defendant from receiving his pension and directing the sequestrators to receive the same at the treasury without serving any order on the lords of the treasury for that purpose."

In the United States, not only has it been considered against

<sup>17</sup> Ball & Beatty's Rep. 389; *Lidderdale v. Montrose*, 4 Term. R. 248.

public policy not to protect the pension certificates of the soldiers from sale, pledge, or execution, but the congress of the United States has passed a statute regulating the subject.<sup>18</sup>

§ 229. *The debt or engagement.*—It is essential to every valid contract that it should be supported by a consideration; so the contract creating this relation must be supported by a consideration. The debt or agreement which the pledgor seeks to secure, furnishes a consideration upon the part of the pledgee to support the pledge. This consideration, in order to support the contract, must of necessity be a valid one. It therefore follows that the debt or engagement that is sought to be secured must be valid, and if it be an illegal debt, or the engagement be illegal or against public policy or good morals, the consideration for the pledge will fail.

In *Taylor v. Chester*<sup>19</sup> the plaintiff deposited with defendant the half of a 50l. banknote by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch, the plaintiff having brought action to recover the half note. Held, that the maxim *in pari delicto potior est conditio possidentis* applied, and that the plaintiff could not recover without showing the true character of the deposit, and that being an illegal consideration, to which he

<sup>18</sup> R. S. U. S., sec. 4745. "Any pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension which has been or may hereafter be granted, shall be void and of no effect; and any person acting as attorney to receive and receipt for money for and in behalf of any person entitled to a pension shall, before receiving such money take and subscribe an oath to be filed with the pension agent, with the vouchers now required by law, to the proper accounting officer of the treasury, that he has no interest in such money by any pledge, mortgage, sale, assignment or transfer, and that he does not know or believe that the

same has been so disposed of to any person." *Moffatt v. Van Doran*, 4 Bosw. (N. Y.) 609. "In an action to recover possession of a pension certificate issued to the plaintiff, it is no defense either legal or equitable that the plaintiff left such certificate with the plaintiffs as security for goods thereafter sold and delivered by them to him, relying on such security, and that there is a balance due to them for such goods. Such facts do not create a lien in defendant's favor upon the certificates, nor constitute a right to any relief in this action."

<sup>19</sup> L. R. 4 Q. B. 309; *Chitty on Contracts*, 597 (6th ed.).

himself was a party, he was precluded from obtaining the assistance of the law to recover it back.

It is also said in Chitty on Contracts, "Whenever the contract which the parties seek to enforce, be it express or implied, is expressly or by implication forbidden by the common or the statute law, no court will lend its assistance to give it effect. . . . And the test as to whether a demand connected with an illegal transaction be capable of being enforced at law is whether the plaintiff must rely on such transaction in order to establish his case." Such contracts are also invalid and will be impeached on the ground of public policy.

In Story's Equity Jurisprudence the doctrine is laid down that where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participators in a common-law crime, will not interpose to grant any relief, acting upon the well-known maxim "*in pari delicto potior est conditio defenditis et possidentis*." <sup>20</sup> It therefore follows that the rule of law is, that if the consideration of the debt for which the property is pledged is an illegal or immoral one, the courts will not lend their aid to secure such a debt, but will adopt the rule so well settled in such cases, that the law will leave the parties where it found them. And so if a pledgor voluntarily delivers his property to secure such an immoral or illegal debt, the courts will not assist him to recover his property back, but will leave it as the parties left it; therefore it follows that the pledgor could not recover the property until he had paid the debt.

§ 230. Pledge as collateral security.—Property is often pledged as collateral security for the payment of promissory notes or other negotiable paper, with full power to sell the pledged property if default is made in paying the debt. The pledge may be made to secure the payment or obligation of the pledgor or any other person. The rights, duties and liabilities of the parties to such a pledge will be discussed under another head.<sup>21</sup>

<sup>20</sup> Story's Eq. Juris. 298. In *Biggs v. Lawrence*, 3 T. R. 454, it is held that the plaintiffs could not recover for goods sold to the defendants where they knew that

the goods were purchased to be smuggled and that they packed them for that purpose. *Clugas v. Penaluna* 4 T. R. 466.

<sup>21</sup> *Post*, § 313. A liability for an-

§ 231. — **Contract should specify debt secured.**—The contract or agreement creating the pledge should specify the particular debt that is to be secured. This is important, as it can only be determined by the agreement of the parties what obligation the property is held to secure, and the pledged property cannot be held by the pledgee as security for any other debt than that intended to be secured and which is in the contract by express terms or implication. If the indebtedness for which the collateral is pledged is not specified, but the pledgor simply pledges the property generally for any indebtedness then existing or to be created in the future, the property may be held in such case as security generally for any and all indebtedness.<sup>22</sup>

In *Garton v. Union City Bank*<sup>23</sup> the pledge consisted of a promissory note of \$1,000 given to the cashier or order of the bank, to which was appended: "This note is to be used as collateral security to A. Climie's notes." In that case the court held that it was proper to introduce oral proof to show the true consideration and the identity, nature and amount of demands to which the note was collateral; the court using this language: "The purpose was to correctly apply the note to the transactions it indicated it was intended to cover, and confine it to the very claims it purported to secure. . . . It indicated on its face, or rather by the memorandum connected with it, that it was to be carried out and enforced restrictively as against Mrs. G. (the maker), and with reference to particular bank demands against Climie, and the intent could not be carried out

other upon a contract still in force is a sufficient consideration for a pledge, and the ratio of the consideration to the value of the thing pledged is of no importance. *Jewett v. Warren*, 12 Mass. 300.

<sup>22</sup> *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338. In this case the force of the language of the agreement which created the pledge was discussed, as to whether or not it was for debts not in existence at the time of the pledge, but afterwards obtained by the pledgee; the court holding that the extent of the pledge must de-

pend upon the contract by which the property was pledged. *Norton v. Plumb*, 14 Conn. 512; *Fairfield v. Holley*, 10 Conn. 179. In *San Antonio Nat. Bank v. Blocker*, 77 Tex. 73, it was held that where collateral was pledged generally for the debts of a partnership, it could not be held for a private debt of one of the partners. *Loyd v. Lynchburg Nat. Bank*, 86 Va. 690; and see cases collected and cited, 18 Am. & Eng. Ency Law, 599, etc.

<sup>23</sup> 34 Mich. 279.

and strict protection be accorded Mrs. G.'s rights without showing the facts."

§ 232. Pledge may be to secure past, present or future indebtedness.—Property may be pledged to secure not only a debt created at the time of making the pledge, but also an indebtedness past due, or an indebtedness to be created in the future. If the debt, however, be a past-due debt, that is, a debt that is known to be a pre-existing debt, it is subject to some certain limitations. The pledgee or creditor might not, under certain circumstances, be considered a *bona fide* holder for value to the extent that he could hold the property thus pledged as security for the payment of a pre-existing debt against the true owner from whom it had been obtained by fraud, for the reason that he parted with no consideration in the obtaining of the pledge.<sup>24</sup> This is more fully discussed in another section.<sup>25</sup>

§ 233. — The pledgor may pledge his property to secure the debt of another.—The pledge may be by the pledgor to secure another's debt or obligation as well as his own. In such case the pledge is the same as surety for a debt, and the pledgor would be entitled to all the rights and limitations that belonged to a surety for a debt or obligation. And so any change in the contract of suretyship without his consent or knowledge, that is, such a change as would discharge a surety, would release and discharge the pledged property so held as collateral security.<sup>26</sup>

<sup>24</sup> A pledge of stock by a stranger to secure a debt past due, without any promise on the part of the pledgee to forbear, is without consideration. *Huldeman v. German Security Bank (Ky.)*, 44 S. W. 383. Where a chattel is pledged for a pre-existing debt, the pledgee is not a holder for value to the extent that it will enable him to retain it against the true owner from whom it has been obtained by fraud, as he could do if he were a true holder for value. *Story on Bailments*, sec. 300; *Schouler on Bailments*, sec. 178.

<sup>25</sup> *Post*, sec. 244

<sup>26</sup> In *Price v. Dime Savings Bank*, 124 Ill. 317, the court held "that the change in the terms of the original contract without the consent of A. was sufficient to release his undertaking that his property should stand as security for its performance." *Dodgson v. Henderson*, 113 Ill. 360; *Davis v. People*, 1 Gilm. 409; *Waters v. Simpson*, 2 id. 570; *Myers v. Bank*, 78 id. 257; *Danforth v. Semple*, 73 id. 170; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338. See cases cited in brief for appellant, p. 340. The court at page 348 say: "The cases cited on the second question are based upon a principle not

If, however, the contract of pledge was such that the court might hold that it would be inclusive of extensions of time of payment, then in such case such extensions would not discharge or release the pledge.<sup>27</sup>

§ 234. — As to holding property for a former or another debt.—The mere fact that the pledgor is indebted to the pledgee on a former or other indebtedness will not authorize the pledgee to retain the pledged property after the debt or obligation for which it is pledged is discharged, unless there is some agreement from which such an intention of the parties can be drawn.<sup>28</sup> The pledge may be for one or many debts, but the extent of the pledge, the debt or obligation it is pledged to secure, must be determined by the agreement. In *Re Mosser's Estate* <sup>29</sup> it was held, where a judgment was given as collateral

denied, that a gift of time to a principal debtor discharges the surety; but it will be found that in them new arrangements, not contemplated at the time of entering into the guaranties by any of the parties, are introduced; and thus the state of circumstances altered without the contemplation and without the consent of one of the parties."

<sup>27</sup> *White's Bank v. Myles*, 73 N. Y. 335; *First Nat. Bank of Omaha v. Goodman et al.* (Neb.), 79 N. W. 1062. Where policies were pledged by the wife to secure a claim for which continuing security had been given granting extension of time to the debtor, the pledge would not be discharged.

<sup>28</sup> *Jones on Pledges*, sec. 355; *Baldwin v. Bradley*, 69 Ill. 32; *Jarvis v. Rogers*, 15 Mass. 389; *Mahoney v. Caperton*, 15 Cal. 314; *Buckley v. Garrett*, 60 Pa. St. 333. In determining the effect to be given to an absolute assignment of securities, the whole transaction between the parties must be taken into account. *Boardman v.*

*Holmes*, 124 Mass. 438; *Hilton v. Sims*, 45 Ga. 565.

<sup>29</sup> 161 Pa. St. 469. "If it be competent for the parties to a judgment by their own parol agreement to change the purposes for which it may be held—and that they may do so is not open to question,—I see no reason why such parol agreement may not be entered into on behalf of either by an agent acting under parol authority." In *Philler v. Jewett*, 166 Pa. St. 456, it was held that securities deposited by a bank belonging to a clearing-house association with the clearing-house committee, and pledged according to the clearing-house regulations adopted by the associative banks, first for payment of its daily balances, and next as security for other indebtedness due to members of the association, will be held after payment of daily balances to meet a deficiency of other securities given by it to the clearing-house committee to provide for payment of clearing-house certificates issued to it and in maintaining its credit.

security for a note which was afterwards paid, a parol agreement between the creditor and the agent of the debtor to continue such judgment as security for certain other notes of the debtor was valid as against subsequent judgment creditors of such debtor.

§ 235. — **Continuing security—Future transactions.**—By the agreement of the parties the pledge is often made to cover future transactions, such as renewal of notes, extension of time of payment, and even new and additional indebtedness. It is a matter of frequent occurrence that banks take from their customers bank notes and mortgages with the understanding that they shall be held as collateral security to cover all indebtedness, renewals or advances made to the pledgor; this is generally done by entering into a written contract, but it may be by parol and delivery of the property pledged. These pledges may be said to be in the nature of continuing securities and the courts will enforce such transactions. Such was the security in question in *Merchants' Nat. Bank v. Hall*,<sup>30</sup> where certain stocks were assigned to the plaintiff as security for payment of any demands plaintiff might have from time to time against assignor's husband, who at the time was largely indebted to the plaintiff. The court held that the assignment by its terms included and secured all demands had and held by the plaintiff against the husband of the assignor after its execution, as well as those existing at that time, and that the circumstances disclosed this to have been the intent of the parties; also that the assignment was a continuing security, and that an extension of time by renewals, in the ordinary course of business, granted by the plaintiff for payment of any of the debts, did not discharge the lien upon the stock. Such a pledge is as limitless as it well could be. . . . As was said by the court, "it specifies no kind of demand, no amount, no length of time of any indebtedness for which the stock might be liable. The pledgor, however, of such a pledge could at any time by a notice to the pledgee limit the pledge, but until notice of such limitation was given it would be held to be a continuing security."<sup>31</sup>

<sup>30</sup> 83 N. Y. 338.

<sup>31</sup> *Agawam Bank v. Strever*, 18 N. Y. 502; *Douglas v. Reynolds*, 7 Pet. (U. S.) 113; *McClure v. Ro-*

*man*, 52 Pa. St. 458; *Texas Banking Co. v. Turnley*, 61 Tex. 365. In Tennessee it was held that the holder of paper received as



§ 236. — When several debts—Application of payment.—

The rule of law as to the application of payments where there are several distinct debts secured by a pledge of property is the same as exists in other cases; if the pledgor makes no application of the payment to any particular debt at the time of making it, the pledgee may apply such payment to whichever of the secured debts he pleases, and if the pledgee is compelled to foreclose the pledge, he may, in the absence of any stipulation in the contract or pledge, so apply the receipts to the debts or obligations so secured. If some of the debts are also secured by collaterals pledged by other persons than the debtor, he still has the right to apply the amount received from the foreclosure to those debts that are not thus secured.<sup>22</sup> And it has been held that the sureties for the secured debt cannot be subrogated to the rights of the pledgee in the proceeds of the foreclosure, nor are they entitled to have the fund apportioned or in any way applied to all of the debts secured by the pledge. On the other hand, the pledgee may make such application as will be for his best interest, if he is not violating any stipulation in the contract of pledge. In order to obtain the privilege of being subrogated to the rights and privileges of the pledgee, such pledgors who have furnished the further security by pledge must first pay all of the debts the property stands pledged for; and in that case they may be substituted and stand in the place of the pledgee creditor. But if only one or more of the debts are paid and the property is pledged for them and other debts, the pledgee will hold the property as security for any other unpaid debts. In *Wilcox v. Fair Haven Bank* <sup>23</sup> the court say: "It is, however, undoubtedly an established rule of equity that a surety who has paid the debt of his principal, either voluntarily or by compulsion, is entitled for his indemnity to any property pledged or collateral security given therefor by the principal to the creditor. But as this rule is founded on the principles of reason and justice and not upon

pledged security holds it subject to equities existing at the time of the transfer, but not to those arising subsequent thereto. *Richards v. Rice*, 9 Baxt. (Tenn.) 290, 40 Am. Rep.

<sup>22</sup> Application of payment. *Fall River Nat. Bank v. Slade*, 153 Mass. 415, 12 L. R. A. 131.

<sup>23</sup> 7 Allen (Mass.), 270.

any contract or stipulation to that effect between the parties, it follows as a necessary consequence that a surety is not to be substituted in the place of a creditor, unless from the circumstances of the case it is shown that it is just and reasonable that he should be. Hence it is obvious that, in order to become entitled to such substitution, he must first pay the whole of the debt or debts for which the property is mortgaged, or the collateral security is given, to the creditor; for it would be manifestly unjust and a plain violation of his rights to compel him to relinquish any portion of the property before the obligation, for the performance of which it was conveyed to him as security, had been fully kept and complied with. Such previous payment by a surety is alike essential where there is only one debt and one surety, and where there are many debts, all of which are equally protected and secured by the property mortgaged, and many several sureties of the several debts; for the chief and primary object of a pledge or mortgage to a creditor is his benefit, protection and advantage in reference to each and all of the several debts which it was made or given to secure, and until this object is fully accomplished no surety can justly or lawfully interfere to disturb him in the possession of the property pledged, or hinder him from appropriating the proceeds of it toward payment of any such debt which he cannot otherwise collect or render available."

§ 237. — **A pledge which secures a debt bearing interest secures the interest as well as the debt.**—This follows as a matter of course. It would be presumed from the very fact that the debt was an interest-bearing debt that it was the intention of the pledgor to secure as well the payment of the interest as the payment of the principal.<sup>34</sup> The pledge is construed to be for the whole debt. By implication it will be understood that the pledge is for the payment of the whole debt or engagement, unless the contract of pledge stipulates otherwise, and so the payment of a part of the debt will not release a part of the pledged property, but the whole of the property may be held to secure the unpaid amount.

<sup>34</sup> Jones on Pledges, sec. 363; made to secure only a part of the Boardman v. Holmes, 124 Mass. debt. Fridley v. Bowen, 103 Ill. 438; Baldwin v. Bradley, 69 Ill. 633, 637.

32. A pledge may however be

§ 237a. **Delivery of the property by the pledgor—Acceptance and continued possession of the property by the pledgee.** These two essentials are so closely connected and so dependent upon each other, that it is thought advisable to discuss them together. The delivering of the property pledged by the pledgor to the pledgee, and the acceptance and continued possession of the property by the pledgee, is that which gives to the world notice of the pledgee's interest and the extent of his rights to the property in his possession. These stand in the place and stead of the recording of a mortgage, or the filing of a lien, as it is a well-understood principle of law that possession of property is notice to all the world of all the rights and interests of the possessor in the property possessed. It has been noticed that in the pledge or pawn there is no recording of the same in a public record kept in some public office; there is no filing of notice of the lien which the pledgee has upon the property. In the place of this, and as effectual as all this would be, is the fact that the property has been delivered into the possession of the pledgee and is held by him as security for the indebtedness. Other creditors of the pledgor may not actually know the extent of the claim, or the conditions of the pledge, but the law holds them, because of this delivery and possession, to a full knowledge of all that pertains to the holding of the pledged property by the pledgee.<sup>25</sup>

<sup>25</sup> There must be a delivery and continued possession. *Dunn v. Train*, 60 C. C. A. 113, 125 Fed. 221; *Chittwood v. Langon Zinc Co.*, 93 Mo. App. 225. By a contract of pledge only a special title passes to the pledgee, which depends on actual possession, while the title of the property remains in the pledgor; and so to hold and protect the lien of the pledgee, there must be not only a physical delivery where the property can be thus transferred, but there must be a continued possession by the pledgee. *Harding v. Eldridge*, 186 Mass. 39, 71 N. E. 115. And so where bonds were the subject of the pledge it was held that

a delivery and continued possession would cure any defect in the contract because of failure to name the specific bonds pledged. *Virginia, Carolina, etc. Co. v. Nair & Persoll*, 139 N. C. 326, 51 S. E. 949. And where the property is in the possession of the pledgee for another purpose, the pledge will become effectual without another or further delivery. *Farsan v. Gilbert*, 114 Ill. App. 17. Pledged certificates of stock not regularly indorsed contained an indorsement that they were hypothecated to secure certain notes, which indorsement was signed by the secretary of the corporation, delivered to the

§ 238. If property not delivered—Pledge, when good.—As between the parties to a pledge, a contract to pledge would be binding even if the property had not been delivered, and such a contract resting upon a valuable consideration could be enforced; for the reason, among others, that equity would consider that as done which ought to be done. Or would apply that other maxim, "Equity considers substance rather than form." But before the doctrine of equitable pledge can be applied there must be a contract showing that the debtor designed to subject the particular property to the payment of the debt.<sup>36</sup> But as against subsequent purchasers in good faith or the creditors of the pledgor, as we have already seen, delivery is an essential; and, as to such persons, the pledgee could not enforce the contract of pledge; there would be no notice of its existence, and the pledgee would not be held to be a *bona fide* holder of the property.<sup>37</sup>

pledgee, held to constitute a valid pledge. *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299. Delivery of bills receivable. *Young v. Upson*, 115 Fed. 192. Must be delivery, *Griffin v. Henry*, 99 Ill. App. 284. Succession of Grayard, 106 La. 298, 30 So. 825. Delivery to and possession by third party for pledgee. *Hunt v. Bode*, 66 Ohio St. 255, 64 N. E. 126; *Re Lanaux's Succession*, 46 La. Ann. 1036, 25 L. R. A. 577. *Bona fides* will not avail pledgee in the absence of delivery and possession, *Gelfuss v. Corrigan*, 95 Wis. 651, 37 L. R. A. 166. Oil in a tank effectually pledged by written order to hold it as pledgee. *First Nat. Bank v. Harkness*, 42 W. Va. 156, 32 L. R. A. 408.

<sup>36</sup> *Hook v. Ayers* (C. C. A.), 80 Fed. 978.

<sup>37</sup> A pledge cannot be created as security for a debt without a transfer of the thing pledged to the pledgee or his agent. *Textor v. Orr*, 86 Md. 392. An executory contract of the pledge may be

good between the parties. *Kaiser v. Topping*, 72 Ill. 226; *Tuttle v. Robinson*, 78 Ill. 332. "It will not be enforced to the injury of other creditors." *City Fire Ins. Co. v. Olmstead*, 33 Conn. 476; *Casey v. Caveroc*, 96 U. S. 467. In the case of *Casey v. Caveroc* it was held: "That possession is of the essence of a pledge, and without it no privilege can exist as against third parties; that this doctrine is in accordance with both the common and the civil law." It was further held "that the thing pledged may be in the temporary possession of the pledgor as special bailee without defeating the legal possession of the pledgee; but where it has never been out of the pledgor's actual possession, and has always been subject to his disposal by way of collection, sale, substitution or exchange, no pledge or privilege exists as against third persons." Until the delivery of the pledged property the transaction is simply an executory con-

§ 239. **The delivery.**—The delivery should be of such a nature that by it the pledgor relinquishes all control of the pledged property to the pledgee, and by it the pledgee obtains the absolute and unequivocal control of it. In *Mahony v. Hale*<sup>22</sup> it was held: "In the case of a pledge, the pledgee must take possession, and to retain it he must retain possession; an actual delivery of property capable of personal possession, and a continued change of possession is essential." "In case of a pledge the requirement of possession in the pledgee is an inexorable rule of law, adopted to prevent fraud and deception. There must not only be an actual delivery of the chattels as distinguished from a mere pretense, but the change of possession must be continuing, not formal, but substantial." The manner of effecting the required delivery, of course, depends upon the nature of the property. If the property is capable of actual manual delivery, it should be so delivered; if not, then the best delivery the property will admit of should be made.

§ 240. **Constructive or symbolical delivery.**—If the property and the circumstances will admit of no better delivery, then a constructive or symbolical delivery will be sufficient. As, for example, if the property be stored in a warehouse with proper notice to the warehouseman, or if held by a contract in the hands of a third person, notice to the holder of the property has been held to be a sufficient delivery.

In *Whitaker v. Sumner*<sup>23</sup> the court say: "It seems now well settled that when personal property is under a pledge or lien, whether created by operation of law or by the act of the owner, the general property remains in the owner, and that he may

tract and the pledgee acquires no right of property in the thing. Story on Bailments, sec. 297; *First Nat. Bank v. Nelson*, 38 Ga. 391; *Wolcott v. Keith*, 22 N. H. 196; *Williams v. Gillespie*, 30 W. Va. 586; *Nesbitt v. Macon Bank*, 12 Fed. 686. A pledge of personal property is invalid as against the pledgor's creditors where no delivery is made, and no actual, open and unequivocal possession taken. *George v. Pierce*, 55 Pac. 775; *George v. Matorn*, 56 Pac. 53. As against creditors, a pledge of

the corporate stock must be accompanied by delivery and a continued change of possession. Delivery, momentary possession and return is insufficient. *McFall v. Buckeye*, etc., 122 Cal. 468, 55 Pac. 253; *Moors v. Reading*, 167 Mass. 322. *Bona fides* does not avail the pledgee in absence of delivery and possession. *Gellfus v. Corrigan*, 95 Wis. 651, 37 L. R. A. 166; *ante*, § 237, note 1.

<sup>22</sup> 66 Minn. 463, 69 N. W. 334; *Casey v. Caveroc*, 96 U. S. 467.

<sup>23</sup> 20 Pick. (Mass.) 399.

transfer it by a proper contract and upon a good consideration, subject only to the lien. And in such case, as the actual custody and possession of the goods for the time being is in the hands of the party having the lien, it follows that a constructive or symbolical delivery is sufficient to pass the property. An order by the vendor upon the keeper, or, if the contract of sale or conveyance be in writing, proper and satisfactory notice of the conveyance by the vendee to the holder, constitutes such constructive delivery. Where goods are lying in a warehouse, although subject to a lien for keeping, notice to the warehouse keeper, where all the other requisites of a sale are proved, is equivalent to a delivery."

In *Hathaway v. Haynes*<sup>40</sup> it was held "that the assignment in blank of a bill of lading to a bank that had by reason of it discounted the draft, conveyed an interest in the property to the bank; and, whether that interest was as security only that the bill should be accepted, or that it should be both accepted and paid, is immaterial. The claimant bank, by the indorsement of the bill of lading, was entitled to hold it and the property described in it." So, where the goods or pledged property is incapable of being delivered by handing the property from one to another, a symbolical delivery will be sufficient to create the pledge; as, for example, if the goods are stored in a warehouse, by delivering the key of the building for the purpose of giving to the pledgee control of the property, or by delivering the evidence of ownership or possession with an intention of turning over the control of the property to the pledgee.<sup>41</sup> It may be said in the light of all the authorities,

<sup>40</sup> 124 Mass. 311.

<sup>41</sup> *Sumner v. Hamlet*, 12 Pick. 76. In the case of *Whitney v. Tibbitts*, 17 Wis. 369, the question was whether, on a pledge of flour stored in a warehouse in Milwaukee, a delivery, by the pledgor, of the warehouse receipt, without indorsement, constituted a sufficient delivery of the property to sustain the pledge as against subsequent attaching creditors of the pledgor and it appeared that said receipt did not run to bearer, but stated that the flour was "deliver-

able only on return of the receipt," and held that the plaintiff was entitled to show that, by a general custom in Milwaukee, flour in store was transferred by a delivery of such receipts without indorsement. The court say: "It seems to me to present a stronger case of delivery than some that are usually referred to as sufficient. Take, for example, the one of a delivery of the key of the warehouse where the property is stored. In that case the vendor, owning the warehouse,

that the test of delivery is whether or not the property has been placed in the possession and control of the pledgee.

might, notwithstanding the delivery of the key, still keep possession of his warehouse and resume control of the property. But where the property is in the warehouse of a stranger, the vendor, by delivering the receipt, divests himself of all the means of con-

trolling or retaining the property, and gives them to the vendee quite as effectually as would the possession of the key. The material thing is, that the vendor delivers to the vendee that which enables the latter in fact to take and control the property."

## CHAPTER II.

### PLEDGING NEGOTIABLE PAPER.

§ 241. Negotiable paper.

242. An equitable assignment.

243. Pledgee holder for value.

§ 244. Whether a pre-existing debt  
a sufficient consideration  
to constitute a pledgee a  
holder for value.

§ 241..Negotiable paper.—Promissory notes, bills of exchange and other negotiable paper are often the subject of a pledge or pawn, and delivery is essential in such cases. The control of the property must be in the pledgee, as in other cases. Just how can this property be delivered? Must it be by endorsement or by written assignment? It is a general rule that whatever delivery of property would be necessary in case of sale would be necessary in order to create a pledge; and it no doubt is the general rule that to pass legal title to such property, as notes and bills, and negotiable paper not made payable to bearer, it would be necessary to indorse the paper or make a written assignment where indorsement or assignment would be necessary in case of sale. That is to say, if the negotiable instrument was one payable to order, as a general rule it would be necessary to create a pledge of it to deliver the instrument, together with the indorsement upon it, which would transfer the property in it. If, however, the instrument is one payable to bearer, or if it be indorsed in blank, then mere delivery alone with the intention of pledging it would be sufficient. The delivery of negotiable instruments unindorsed, where indorsement is required as a pledge, vests in the pledgee an equitable interest; the pledgee in such cases takes the property subject to any prior equities of third persons as against the pledgor.<sup>1</sup> But the general rule seems to be that it

<sup>1</sup> Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33. Held, that the mere delivery of a mortgage, and the bills thereby secured, without a written assignment, is a valid pledge and will

be upheld in equity. A written assignment is not necessary, but the mere delivery of a bond and mortgage as security is a valid pledge and will be so treated. Crane v. Gough, 4 Md. 334; Kam-



is necessary that the negotiable instrument requiring indorsement to make a valid transfer must be so indorsed and delivered in order to pledge it as collateral security. Some of the courts have held that such paper may be pledged by mere delivery and acceptance. In Louisiana delivery of negotiable securities unindorsed seems to be sufficient to constitute a valid pledge. This, however, depends more or less upon a statute of the state.<sup>2</sup> In Georgia it was held, in *Smith v. Jennings*,<sup>3</sup> that the pledgee stood in the place of the pledgor, and was protected against the pledgor whether a subsequent creditor had notice of this equity or not.

§ 242. **An equitable assignment.**—While it is necessary to a pledge of the legal title, in negotiable paper that only passes by indorsement or assignment, to indorse or assign it to the pledgee, it is no doubt true that such paper may by the payee be pledged by mere delivery to the pledgee, to the extent that the pledge will be good as between the parties; the pledge in such case operating as an equitable assignment to the pledgee. At the common law the pledgee, under such circumstances, could maintain a suit in the name of the pledgor, or person having the legal title, and now by reason of statutes in many of the states, in his own name. In *Van Riper v. Baldwin*,<sup>4</sup> the plaintiff

*ena v. Huelbig*, 23 N. J. Eq. 78; *Galway v. Fullerton*, 17 N. J. Eq. 389; *Prescott v. Hull*, 17 Johns. 284.

<sup>2</sup> *Casey v. Schneider*, 96 U. S. 496.

<sup>3</sup> 74 Ga. 551.

<sup>4</sup> 19 Hun (N. Y.), 344; affirmed, 85 N. Y. 618. Delivery passes the equitable title to a negotiable instrument payable to order, and the holder may maintain an action thereon in the name of the payee, or person holding the legal title by statute. However, in most of the states the person holding such equitable title may sue in his own name because he is the real party in interest, but these statutes do not confer upon him the right of a *bona fide* holder by indorsement. In *Coombs v.*

*Warren*, 34 Me. 89, the property in negotiable notes may pass by delivery without indorsement. See also *Billings v. Jane*, 11 Barb. (N. Y.) 620. A negotiable note may be assigned by simple delivery, but the assignment must be made by the rightful owner or under his authority. *Davis v. Lane*, 8 N. H. 224. In *Thompson v. Onley*, 96 N. C. 9, it was held that it was not necessary to give title to a note or bond to indorse it or assign it, and that the question of ownership was a matter of fact for the jury to decide. That the equitable title passes by mere delivery, see *Freeman v. Perry*, 22 Conn. 617; *Miles v. Reinger*, 39 Ohio St. 499; *Foreman v. Beckwith*, 73 Ind. 515; *Beard v. De-dolph*, 29 Wis. 136. In the case

rented certain premises to one Homan, who, by the express direction of his, the lessee's, wife, delivered to an agent of the plaintiff a note made by the defendant, Baldwin, to her order, to secure the payment of the rent to become due under the lease. The note was not indorsed by the wife at the time of its delivery. The rent not having been paid, and the wife having refused to indorse the note, the plaintiff brought this action to recover the amount thereof. Held, "that the pledge of the note operated as an equitable assignment thereof to the plaintiff, and that he could sue thereon in his own name." The court say: "Such delivery of the note constituted a formal pledge thereof for the purposes mentioned, and vested the equitable title thereto in the plaintiff notwithstanding the note was not indorsed by the payee."

§ 243. *Pledgee holder for value.*—A rule analogous to that which obtains in the sale of negotiable paper, as to *bona fide* holders, also obtains in the case of pledging such paper; and it may be said to be a general rule that where a *bona fide* pledgee of negotiable instruments receives them in due course of business, and before maturity, for a valuable consideration without notice of any equities, he becomes a pledgee for value, and will be protected against all equities which may arise between the original parties, and entitled to all the protection that can be claimed by a purchaser of the paper under such like circumstances.\* If, however, there is that upon the face of the instru-

of *Bank of Chadron v. Anderson*, 48 Pac. 197, it was held that simple delivery of a promissory note without indorsement vests a contingent equitable interest. *Commercial Bank v. Homberger*, 140 Cal. 16, 73 Pac. 625. Pledgee may sue using pledgor's name. *Creos v. Yowell*, 25 Ky. L. 598, 76 S. W. 127. Pledgor of collateral liable for necessary expenses of collection, but not for pledgee's personal services. *Bank of Staten Island v. Silvie*, 85 N. Y. S. 760, 89 App. Div. 465; *Manson*, etc. Co. v. *Carey*, 1 Ind. T. 572, 45 S. W. 120. A mere renewal of a note held not to discharge or re-

lease securities deposited as collateral. And where the question raised was whether a note was delivered to be sold or as collateral, court examined facts and held it deposited as collateral. *First Nat. Bank v. Gunhus* (Iowa), 110 N. W. 611.

\* *Warner v. Fourth Nat. Bank*, 115 N. Y. 251; *Oates v. National Bank*, 100 U. S. 239; *Nelson v. Eaton*, 26 N. Y. 410; *Allan v. King*, 4 McLean (U. S.), 128; *Hempner v. Comer*, 78 Tex. 196; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Kinney v. Kruse*, 28 Wis. 183; *Bealle v. Southern Bank*, 57 Ga. 274; *Exchange Bank v. Butner*;

ment which is pledged which would put a reasonably prudent man upon inquiry, it is the duty of the pledgee to inquire, and if he fails to make inquiry he will be held to have had notice of whatever would have been discovered had he made the investigation, and he cannot under such circumstances claim the privileges of a *bona fide* holder because he had no notice of the equities. The rule that he has actual notice of all the facts that an investigation would have discovered obtains.\*

§ 244. **Whether a pre-existing debt a sufficient consideration to constitute a pledgee a holder for value.**—As has already been stated, a pledge of negotiable paper may be made to secure payment of a pre-existing debt; and as between parties, there is no doubt that such a debt is a valid consideration, and will support such a pledge; but whether it is such a consideration as will constitute a pledgee a holder for value if pledged be-

60 Ga. 654; *Duncomb v. New York R. Co.*, 84 N. Y. 190. New Hampshire seems to stand alone in opposing the doctrine that a pledgee, under circumstances mentioned in the text, is a *bona fide* holder. The holding, however, in this state in some of the earlier reports has latterly been more or less limited. See *Jenness v. Bean*, 10 N. H. 266; *Williams v. Little*, 11 N. H. 66; *Goss v. Emerson*, 23 N. H. 38; *Tucker v. New Hampshire Savings Bank*, 58 N. H. 83; *Memphis Bethel v. Bank*, 101 Tenn. 130. When securities pledged by one not the owner and advances are made by pledgee with knowledge of that fact, in action by owner, an instruction that there is proof of bad faith held proper. *Homestead, etc. Co. v. Chapman*, 81 N. Y. S. 38, 80 App. Div. 556. Held *bona fide* pledgee. *Lyman v. State Bank*, 80 N. Y. S. 901. An extension of time granted by a creditor in consideration of a pledge of stock by debtor as security for the debt makes the creditor a *bona fide*

holder for value. *Just v. State Savings Bank*, 132 Mich. 600, 94 N. W. 200. Where owner has clothed bailee with apparent ownership, whereupon bailee wrongfully pledges property, mere notice of the actual ownership by the ballor to the pledgee without tender of the debt will not prevent the sale of the property. *May v. Martin*, 32 Tex. Civ. App. 132, 73 S. W. 840. In this case the owner estopped from attacking validity of pledge. *Brady v. McMorris*, 73 N. Y. S. 532; *Chicago Title, etc., Co. v. Brugger*, 95 Ill. App. 405, affirmed 196 Ill. 96, 63 N. E. 637; *Perth Amboy, etc., Assoc. v. Chapman*, 178 N. Y. 558, 71 N. E. 1104; *Kittler v. Studabaker*, 113 Ill. 342, 352. Where bank stock pledged and nothing on the face of stock showing that bank had lien on it for any debt owing it, held pledgee *bona fide* holder with lien superior to that of bank. *Lyman v. State Bank*, 179 N. Y. 577, 72 N. E. 1145.

\* *First Nat. Bank v. Broadway Nat. Bank*, 47 N. Y. S. 880.

fore maturity and without notice of any infirmities, whether under such circumstances the pledgee will be protected in his holding against prior equities, authorities are not harmonious. The solution of the whole matter would seem to rest upon the question of consideration. Did the pledgee pay anything, or do, or forbear to do, anything? Was there any benefit derived from the transaction of the pledgor? As throwing some light upon the subject, let us consider the nature of a pre-existing debt. It means a debt already existing at the time of executing the pledge; not an indebtedness in any way connected with the transaction or the pledging. But it may be that certain benefits are derived from the contract by the pledgor; as, for example, if the antecedent debt is due and the pledgee is in a situation where he might commence suit upon the indebtedness against the pledgor, and the pledgor under such circumstances should pledge to him the negotiable paper, and by means of the pledge should obtain further time for the payment of the antecedent debt; or, if the pledgee released security for the payment of his debt, or the pledgor had in any way bettered his condition, in such case there would be no doubt but that the contract would rest upon a valuable consideration, and if the negotiable paper was pledged before maturity, under such circumstances the pledgee would be said to be a holder for value; and if the pledgee should, by reason of the contract, become the owner of the negotiable paper, or if by reason of the contract it should be necessary for him to bring an action upon the negotiable paper thus pledged, the courts would hold that he held the paper free from infirmities, and that he was a holder for value and that it was not subject to prior equities. But if, on the contrary, there was no such benefit obtained by the pledgor by reason of the pledge, if the pledgee simply received the security for the antecedent debt, giving nothing in return, if, in other words, there was no moving consideration for the creating of the pledge relation no benefit to the pledgor, in such case the courts have not been entirely harmonious in their holdings. Very many of the state courts, notably New York, Michigan, and Ohio, have held that there being no consideration moving between the parties the pledgee could not be held to be a holder for value; the theory being, as we have already said, that the pledgee gives no consideration for the pledge; he surrenders nothing; is simply made better by reason of the

security. He is not like a *bona fide* purchaser of negotiable paper who pays out his money, or gives up some valuable piece of property or security; on the contrary the pledgee pays nothing, does nothing; he simply receives a benefit; and so many of the courts have held that such a pledgee would acquire no more title than the pledgor had to the property pledged; that is, if the property had been fraudulently acquired by the pledgor, such a pledgee could not hold it against the rightful owner. In short, that he holds it subject to prior equities, having no better title than the pledgor had.

In *Phoenix Ins. Co. v. Church*,<sup>7</sup> this question was considered. In that case the defense was that the note was accommodation paper made for a specific purpose; that it was diverted by the payee, and was received by the plaintiff on account of a pre-existing debt only. The court found in substance that the note was executed by defendant without consideration for the accommodation of the payee, and for the specific purpose of taking up therewith a prior accommodation note made by the defendant; so it will be seen that there would have been a complete defense to this note as between the maker and the payee. In the brief for appellant very many authorities are cited to the effect that, the note having been diverted to the injury of the maker and the plaintiff having paid nothing for it, it was subject to all the equities existing against dishonored paper. The court in its opinion say: "It is the settled law of this state that prior equities of antecedent parties to negotiable paper, transferred in fraud of their rights, will prevail against an indorsee who has received it merely in nominal payment of a precedent debt, there being no evidence of an intention to receive the paper in absolute discharge and satisfaction beyond what may be inferred from the ordinary transaction of accepting or receipting it in payment or crediting it on account. The law regards the payment under such circumstances as conditional only, and the right of the creditor to proceed upon the original indebtedness after the maturity of the paper is unimpaired."

The Massachusetts courts hold to a different doctrine. In

<sup>7</sup> 81 N. Y. 218; *Day v. Codding-*  
ton, 5 Johns. Ch. 54; *Comstock v.*  
*Hier*, 73 N. Y. 269; *Moore v. Rider*,  
65 N. Y. 438; *Lawrence v. Clark*,

36 N. Y. 128; *Rosa v. Brotherson*,  
10 Wend. 85; *Weaver v. Barden*,  
49 N. Y. 286.

*Spaulding v. Kendrick*\* the court say: "The law of the case is settled by numerous decisions. If a thief gives stolen money or negotiable securities, before their maturity, in payment of his debt, or as security for it, to one who in good faith receives the money or security as belonging to him, the creditor can hold the property as against the true owner. As between the payor and the payee there is no mistake which affects the validity of the transaction. One receiving money or negotiable securities in payment of or as security for an existing debt is not bound to inquire where the money or securities were obtained. It is better that money or a negotiable security, passing from hand to hand to one who rightly receives it for a valuable consideration, should carry on its face its own credentials.<sup>9</sup> It has often been decided in this commonwealth that a pre-existing debt is a valuable consideration for a payment made or a security given on account of it."<sup>10</sup>

In *Goodman v. Conkling*<sup>11</sup> it was held that where some security for the payment of the pre-existing debt was surrendered in consideration of a new note given in security for the payment of the debt, that the plaintiff became a *bona fide* holder for value, and that this consideration was sufficient to exclude prior equities. In the brief of counsel authorities will be found cited sustaining this proposition.

In *Mayer et al. v. Heidelberg et al.*,<sup>12</sup> it was held "that the actual and absolute extinguishing of the debt in consideration of the transfer of negotiable paper is sufficient to render the transferee a holder for value within the rules protecting such a holder against prior equities." Among other things the court say: "The respondents rely upon two propositions which have thus far prevailed: (1) That the actual payment and

\* 172 Mass. 71.

<sup>9</sup> Merchants' Ins. Co. v. Abbott, 131 Mass. 397; Lime Rock Bank v. Plimpton, 17 Pick. 159; Greenfield School District v. First Nat. Bank, 102 Mass. 174; Thatcher v. Pray, 113 Mass. 291; Jaques v. Marquand, 6 Cowen, 497; Dunlap v. Limes, 49 Iowa, 177. See also Mason v. Waite, 17 Mass. 560, 563; Worcester Co. Bank v. Dor-

chester & Milton Bank, 10 Cush. 488.

<sup>10</sup> Blanchard v. Stevens, 3 Cush. 162; Fisher v. Fisher, 98 Mass. 303; Goodwin v. Massachusetts Loan & Trust Co., 152 Mass. 189; Merchants' Nat. Bank v. Haverhill Iron Works, 159 Mass. 158; National Revere Bank v. Morse, 163 Mass. 383.

<sup>11</sup> 85 N. Y. 21.

<sup>12</sup> 123 N. Y. 332.

absolute discharge of an antecedent debt is a valuable consideration for the transfer of commercial paper, and cuts off prior equities. . . . I have no doubt as to the soundness of the first proposition. It was explicitly conceded in *Coddington v. Bay*,<sup>13</sup> which originated the difference between the courts of this state and the concurring views of the federal court and those of England. While it was in that case ruled that the transfer of negotiable paper as collateral security merely for an antecedent debt did not make the creditor a holder for value within the rule cutting off prior equities, it was yet asserted that such result followed, where, among other things, some existing debt was satisfied thereby. And that I think, was a natural and logical conclusion from the reasoning upon which the decision rested. The argument was that the holder of the paper merely as collateral lost nothing by its failure, since his debt all the time remained, his original position was unchanged, and he had simply failed to get an added security, himself parting with nothing. It is apparent that the reasoning fails, whenever, as a result of the new contract, the original debt has been actually extinguished, when the paper received has been both transferred and accepted as payment, and the debt has been discharged within and by force of the acts and concurring intention of both parties. And so we have steadily decided."

An early case in the United States supreme court decided by Judge Story lays down a different doctrine. In the case of *Swift v. Tyson*<sup>14</sup> the court say: "It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties of which he has no notice only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in

<sup>13</sup> 5 Johns. 57.

<sup>14</sup> 16 Pet. 1; 14 U. S. (Curtis) 166. This case is followed by *Railroad Co. v. National Bank*, 102 U. S. 14. See number of cases

cited in 26 U. S. L. Ed. 1039, Annotations 102 U. S. —, also Annotation U. S. R. 38 L. Ed. 133, Annotation, 16 Pet. 1.

payment of or as security for a pre-existing debt is according to the known usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or secure his debt, and thus may safely give a prolonged credit or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security, to banks in lieu of old securities discounted by them which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.<sup>15</sup>

<sup>15</sup> The Michigan cases upon pre-existing debt being an insufficient consideration, will be found collected and discussed in *Schloss v. Feltus*, 103 Mich. 525, 36 L. R. A. 161, where it was held that "a naked pre-existing debt is not such a consideration or payment for the transfer of a stock of goods as will defeat replevin by the original vendor, who sets up fraud in the purchase of the goods from them. This case was cited in the case of *Hees v. Curry*, 115 Mich. 654, where the validity of

a chattel mortgage was attacked upon the grounds that the consideration was a pre-existing debt, but held good because other and further valid consideration supported the mortgage. *Kop Bros. Co. v. Smith*, 137 Mich. 28, 107 N. W. 79, where it was held that one who takes goods in payment of a past due indebtedness will not be protected against a defect in the title of his vendor on the ground that he is a *bona fide* purchaser.



## CHAPTER III

### NON-NEGOTIABLE AND QUASI-NEGOTIABLE INSTRUMENTS.

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| <p>§ 245. The nature and effect of such instruments.</p> <p>246. The pledging of corporate stock.</p> <p>247. What deemed sufficient delivery by pledgor to pledgee.</p> <p>248. — Transfer in blank.</p> <p>249. Legal or equitable title.</p> <p>250. How affected by charter and by-laws of the company.</p> <p>251. The pledgee protected as against creditors.</p> <p>252. The pledgee of stock by indorsement may transfer the title.</p> <p>253. Bills of lading subject of pledge.</p> <p>254. Delivery by the pledgor.</p> <p>255. Mere delivery of the bill sufficient.</p> <p>256. Bill of lading to consignee with draft attached.</p> <p>257. A bill of lading, how far negotiable.</p> <p>258. Who are <i>bona fide</i> holders of bills of lading.</p> <p>259. Rights of <i>bona fide</i> holders.</p> | <p>§ 260. <i>Bona fide</i> holder from agent of owner, or one having apparent title.</p> <p>261. The warehouse receipt as collateral.</p> <p>262. Delivery of the receipt required—Indorsement in blank.</p> <p>263. — Pledge created by mere delivery of receipt.</p> <p>264. Statutes of states, with reference to pledgee of warehouse receipt.</p> <p>265. — If the receipt is made to bearer.</p> <p>266. Insurance policies as collateral.</p> <p>267. — Delivery a requisite.</p> <p>268. — How delivered.</p> <p>269. By indorsement in blank and delivery.</p> <p>270. Notes and mortgages, and bonds and mortgages.</p> <p>271. Mere delivery as a pledge.</p> <p>272. Full, complete assignment and transfer.</p> <p>273. Pledge distinguished from chattel mortgage.</p> |
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§ 245. The nature and effect of such instruments.—Instruments that are non-negotiable, that are simply the evidence of the ownership of certain interests or property, may be the subject of a pledge. While these instruments cannot be said to be the property itself, they are the indicia of ownership, the muni-ments of title known and recognized in the business world, bought, sold and pledged as property for the reason that they

represent property, and by their transfer the property they represent is transferred. We cannot discuss the pledging of every class of non-negotiable instruments known and recognized in business, as it would consume too much space; only those most commonly known and used can be noticed. Among these may be mentioned stocks of corporations, bills of lading, warehouse receipts, insurance policies, mortgages and savings bank books.

§ 246. **The pledging of corporate stock.**—Because of the rule that a valid pledge requires a delivery of the property by the pledgor to the pledgee and an acceptance and continued possession by the pledgee, it has not always been thought that stock in a corporation could be the subject of a pledge; but opinions upon that subject have changed, and there is no longer any question as to such property being the subject of a pledge. The certificate of stock, of course, is not the property itself, but it represents the property; and the holder of the certificate, by reason of it, is the holder and possessor of the certain property interests in the property of the corporation which the certificate represents, whether it be personalty or realty; and those interests so represented by the stock certificate may be purchased, sold and transferred by the transfer of the certificate of stock. This being true, it certainly follows that corporate stock may be the subject of a pledge.

The court in *Brewster v. Hartley*<sup>1</sup> say: "A delivery to the pledgee of the thing pledged is essential to the contract, and until that act is performed the special property that the bailee is entitled to hold does not vest in him. In respect to most kinds of property, a delivery of the property to the pledgee, without any written transfer of the title, is sufficient to pass the requisite special property. Incorporeal property, being incapable of manual delivery, cannot be pledged without a written transfer of the title. Debts, negotiable instruments, stocks in incorporated companies, and choses in action generally, are pledged in that mode. Such transfer of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property. The transfer of the title, like

<sup>1</sup> 37 Cal. 15-25. In *Wilson v. Little*, 2 N. Y. 443, the court say: "The general property which the pledgor is said usually to retain

is nothing more than a legal right to the restoration of the thing pledged on payment of the debt."

the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged. The transfer in writing of shares of stock not only does not prove that the transaction is not a pledge, but the stock, unless it is expressly made assignable by the delivery of the certificates, cannot be pledged in any other manner."

§ 247. **What deemed a sufficient delivery by pledgor to pledgee.**—Delivery and possession of the pledged property is as much of an essential when stock in a corporation is the subject of the pledge as in any other case. If the stock is regularly transferred by indorsement and upon the books of the company, and is held by the pledgee as a pledge, there can be no doubt of the sufficiency of such a transfer and delivery; and when so held in good faith by the pledgee as security for the payment of a debt, or the performance of an obligation, the law will protect the pledgee's holding and security, not only as against the pledgor, but also against all persons claiming from or under him. It is not, however, necessary that the stock should be transferred on the books of the company except under certain circumstances, to protect the pledgee against creditors or subsequent purchasers in good faith, because the certificate indorsed in blank and delivered to the pledgee would be *prima facie* evidence of ownership, and a presentation to the proper officers of the company of a certificate so indorsed would entitle the holder to have the stock transferred to him. The indorsement in blank of the certificate of stock by the owner authorizes the person to whom he delivers it with intention to transfer it or pledge it, or his assigns, whether pledgee or vendee, to write over the signature of the owner indorsed upon the stock certificate a full assignment of the stock, with directions to transfer the same upon the books of the company.<sup>2</sup>

§ 248. — **Transfer in blank.**—As we have seen, stock certificates may be transferred by indorsement in blank and delivery of the certificate. This manner of transfer, no doubt, grows out of the demand that business usage has made. Espe-

<sup>2</sup> German Union Ass'n Bldg. v. Sendmeyer, 50 Pa. St. 67; Mt. Holly, etc. Turnpike Co. v. Ferree, 17 N. J. Eq. 117. A certificate of stock is transferable by a blank indorsement which may be filled

up by the holder by writing an assignment and a power of attorney over the signature indorsed. Kortright v. Commercial Bank, 20 Wend. 91.

cially is this manner of transfer and delivery applicable to the subject under consideration. It is not the desire of the pledgor to transfer his stock absolutely upon the books of the company; he simply desires to make such a delivery of the stock as will be security in the hands of the pledgee for the payment of the debt or the performance of the undertaking. And so it has become to be a well-settled usage recognized and practiced, to execute a pledge of stock as security by delivery of the certificate of shares indorsed in blank.

In the case of *Kortright v. Commercial Bank of Buffalo*,<sup>\*</sup> it appeared that by the by-laws of the company the stock was transferable only upon the books of the company; that the owner of certain shares of bank stock thus transferable sent his certificate with a blank power of attorney under seal, and his own promissory note, to an agent to be used in obtaining a loan. The loan was subsequently obtained upon these securities by the agent, who absconded with the money. The pledgee filled up the blank transfer and power of attorney over the signature of the owner, and demanded a transfer of the shares to himself upon the books of the bank, which the bank refused to allow. In a suit by the pledgee against the bank upon such refusal, the pledgee was held to be entitled to recover. Chief Justice Nelson, speaking for the court in denying a motion for a new trial, said that the filling up of the blank transfer over the signature of the owner indorsed upon the certificate and the power of attorney was in "strict conformity with the universal usage of dealers in the negotiation and transfer of stock according to the proof in the case. Even without the aid of this usage there could be no great difficulty in upholding the assignment. The execution in blank must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank; the owner might have completed the instrument. The usage however is well established, and was fully understood by the owner, as he made the transfer in conformity to it, and he, or those setting up a claim under him, should not be permitted to deny its validity. The filling up is but the execution of an authority clearly conveyed to the

<sup>\*</sup> 20 Wend. 91.

holder; is lawful in itself, and convenient to all parties, as it avoids the necessity of needlessly multiplying transfers upon the books."

§ 249. **Legal or equitable title.**—There has been some disagreement among the authorities as to what constitutes a legal title to corporate stock, and what establishes merely an equitable title. It can, however, only become important when a pledgee, violating good faith, undertakes to transfer the property pledged. To possess the legal title to corporate stock, one must be the *bona fide* owner and possessor in his own name of the stock, issued by the proper officers of the corporation, and so appearing on the books of the company. Such an ownership as would entitle him pursuant to the by-laws and regulations of the company to participate as a stockholder and vote the stock at a stockholders' meeting; while one may be said to have an equitable title who owns stock which does not appear in his own name on the books of the company, and where something is necessary to be done before he can participate in all the privileges of a stockholder, or vote the stock in a stockholders' meeting. As, for example, where one holds stock by a certificate indorsed by the legal owner in blank, which certificate, so indorsed, may be presented to the officers of the company, cancelled and a new certificate issued for the stock it represents direct to him and in his name.

In *Mt. Holly, etc., Turnpike Co. v. Ferree et al.*,<sup>4</sup> the court say: "The certificate of stock, accompanied by the power of attorney authorizing the transfer of the stock to any person, is *prima facie* evidence of equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate,

<sup>4</sup> 17 N. J. Eq. 117. In this case the court say: "Considerations of commercial convenience and public policy suggest the true rule upon this subject. Where a certificate of shares of stock in an incorporated company, accompanied by an irrevocable power of attorney from the owner to transfer them, either filled up or in blank, are in the hands of the third party, he is presumptively the equitable owner of the shares, and if he has given value for them without notice of any inter-

vening equity, his title as such owner cannot be impeached." *Bank of America v. McNeill*, 10 Bush (Ky.), 54. In this case the court speaks of an assignment of the certificate with power to transfer, where the corporation's charter provides for a transfer upon its books, as a symbolical delivery of the stock, effectual against persons having actual notice of it. *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507; *Bruce v. Smith*, 44 Ind. 1, 5.

and when the party in whose hands the certificate is found is shown to be a holder for value without notice of any intervening equity, his title as such owner cannot be impeached. The holder of the certificate may insert his own name in the power of attorney and execute the power and thus obtain the legal title to the stock whenever the loan for which it was hypothecated becomes due, or whenever by the terms of his contract he becomes entitled to the stock; and such a power is not limited to the person to whom it was first delivered, but inures to the benefit of each *bona fide* holder into whose hands the certificate and power may pass; and the title of the holder is in no wise affected by a provision in the charter or by-laws of the corporation that the stock is transferable only on the books of the corporation; such provision is intended merely for the protection and benefit of the corporation. These principles have been repeatedly recognized by the courts of other states, and in commercial cities, and constitute the basis of daily business transaction."

Somewhat different from this case and generally supported by the weight of authority, is the case of *Cushman v. Thayer Mfg. Co.*<sup>5</sup> the action was brought to compel the defendant to transfer upon its books certain shares of stock to the plaintiff, and issue a new certificate for the same to her. The court, in its opinion, say: "A court of equity will enforce a specific performance of a contract for the sale of real estate, and compel the execution of a deed by the vendor to the vendee, although an action at law may be brought to recover damages for the breach of the contract. Such a case bears a striking analogy to the one now presented, and the same principle is manifestly applicable where the remedy at law is inadequate to furnish the proper relief. That an equitable action will lie in such a case has been distinctly recognized in a number of the adjudicated cases in this state" (citing authorities). And again the court say: "The delivery of the certificates, as between the owner and assignee, with the assignment and power indorsed, passes the entire legal and equitable title in the stock, subject only to such liens or claims as the corporation may have upon it.<sup>6</sup> Any act suffered by the corporation that invested a third party with the ownership of the shares, without due production and sur-

<sup>5</sup> 76 N. Y. 365.

N. Y. 325; N. Y. & N. H. R. Co.

<sup>6</sup> *McNeill v. Tenth Nat. Bank*, 46

*v. Schuyler*, 34 id. 30, 80.

render of the certificate, rendered it liable to the owner; and it was its duty to resist any transfer on the books without such production and surrender.” But for the purposes of our discussion it is not material whether the title created is equitable or legal, for it is well settled that delivery of stock, indorsed in any of the ways mentioned, will support a pledge; that between the parties such a delivery and indorsement will transfer the title, and to that end it is not necessary that there should be a transfer upon the books of the company. In *Johnston v. Laflin*<sup>8</sup> the court held that, as between the parties, the title to shares of the capital stock of a national bank passes when the owner delivers his stock certificate to the purchaser with authority to him, or any one whom he may name, to transfer them on the books of the bank.

§ 250. **How affected by the charter and by-laws of the company.**—It cannot be said that a by-law of a company which requires that the stock shall be transferred upon its books, or a charter of a company prescribing the mode in which the stock shall be transferred, are unimportant. There is no doubt but that this regulates the respective rights of the corporation and the individual stockholders, and it is held that a holder of a certificate of stock indorsed in blank cannot assert a legal title against the corporation itself without such a transfer upon its books.<sup>9</sup> As we have seen, this does not affect the title to the stock as between the owner and the pledgee, or the holder by indorsement in blank; it is simply a regulation which the company may insist upon being carried out by its stockholders. The company, however, could not legally refuse, upon presentation of such a certificate duly indorsed, to transfer the stock, and if it should refuse it could be compelled to make the transfer upon its books.

<sup>7</sup> *Smith v. Am. Coal Co.*, 7 Lans. 317; *Leitch v. Wells*, 48 N. Y. 585; *Grymes v. Hone*, 49 N. Y. 17; *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 623. In this case it was held that “one who takes an assignment of a stock certificate as between him and the transferor takes the whole title, both legal and equitable.” *Cecil Nat. Bank v. Watson town Bank*, 105 U. S.

217; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Johnston v. Underhill*, 52 N. Y. 203.

<sup>8</sup> 103 U. S. 800.

<sup>9</sup> *Beecher v. Wells Flouring Mill Co.*, 1 Fed. Rep. 276; *Laing v. Burley*, 101 Ill. 551; *Oatis v. Gardner*, 105 Ill. 436; *People v. Robinson*, 64 Cal. 373.

In *Smith v. Crescent City Live Stock Co.*<sup>10</sup> the court say: "The by-laws which require transfers of stock to be recorded on the books of the corporation regulate merely the respective rights of the corporation and the individual stockholders; no one can claim to be a stockholder and to exercise the rights of a corporator in virtue of a sale of stock to him until the corporation has taken cognizance of the sale and by transfer on its books has substituted the purchaser for the seller. Whether one has acquired the character and the rights of a corporator is a question to be determined by the laws of the corporation. Whether a purchaser has acquired . . . a good and perfect title to any property, tangible or intangible, is a question to be solved by the laws of the state, applicable to the sale and transfer of such objects."

As between the stockholder and the corporation, the records of the corporation furnish the evidence of their relation, and in the case of *People v. Robinson*<sup>11</sup> it was held that "a transfer not entered on the books of the company has no validity outside of the parties to such transfer. If not, could it affect the validity of an election at which trustees of the company were elected? If so, would not a transfer, although not entered on the books of the company, be valid outside of the parties to such transfer? The construction which we feel compelled to give to this clause is, that a transfer of stock, until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company, is as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election."<sup>12</sup>

§ 251. **The pledgee protected as against creditors.**—At common law the delivery of the certificate of stock, with the power to transfer on the books of the company, is a sufficient delivery, and, when there is no statute to the contrary, such a transfer of stock will carry the entire title as against outside equities

<sup>10</sup> 30 La. 1378-82; *Litner's Appeal*, 82 Pa. St. 301.

<sup>11</sup> 64 Cal. 373.

<sup>12</sup> *State v. Ferris*, 42 Conn. 560; *Hoplin v. Buffum*, 9 R. I. 513;

*Gilbert v. Manufacturing Iron Co.*, 11 Wend. 627; *Bank of Buffalo v. Kortright*, 22 Wend. 348; *State of Nevada v. Pettinell*, 10 Nev. 141.



and creditors of the pledgor.<sup>13</sup> In many of the states, however, there are statutes expressly providing that such transfer shall not be good against creditors unless it is transferred upon the books of the company. In such states the courts, following the statutes, have held that in order that a pledgee be protected against the creditors of the pledgor it is necessary that the stock delivered to him in pledge shall be transferred upon the corporate books.

A very full discussion may be found in the case of *Scott v. Pequonnock Nat. Bank*.<sup>14</sup> The stock in this case (bank stock) had been sold and transferred by indorsement and written assignment and power of attorney, but had not been transferred upon the books of the company; it was levied upon by a creditor of the transferrer; the transferee brought an action at law to recover damages from the defendant corporation for refusal to allow a transfer upon its books. The court say, among other things: "In the absence of a statute or of a provision in the charter, or of a by-law passed in pursuance of authority conferred by the charter, prescribing the exclusive manner in which the stock of a corporation shall be transferred, the stock owner has a right to transfer such property to a purchaser by the delivery of the stock certificate with a written assignment thereof. The title of a *bona fide* purchaser to whom such certificate and assignment have been delivered will not be divested by the subsequent attachment of the stock at the suit of the creditor of the vendor. In some of the states statutes have been passed or provisions have been inserted in the charters of the corporations, prescribing, either expressly or by implication, an exclusive method of transfer. . . . The Connecticut decisions, especially the earlier ones, which were made at a time when the rights of attaching creditors were strongly favored, were to the effect that 'in cases where the legislature in the act of incorporation either prescribe the mode of transferring the stock, or authorize the company to do it in their

<sup>13</sup> *Boston Music Hall Ass'n v. Cory*, 129 Mass. 435. In this case it was held a sale of stock in a corporation is valid against a subsequent attached creditor of the seller, although no transfer of the stock is made on the books of the corporation, in the absence of an

express provision of statute, or of the charter of the corporation, requiring such transfer to be made. *Sergeant v. Franklyn Ins. Co.*, 8 Pick. (Mass.) 90; *Fisher v. Essex Bank*, 5 Gray (Mass.), 373.

<sup>14</sup> 15 Fed. 494.

by-laws, and the company do in their by-laws prescribe a mode as the only one to be pursued, that mode must be followed, or the legal title will not pass by an assignment which would be good at common law had no particular and exclusive mode of transfer been prescribed.' ''<sup>15</sup>

In *Fisher v. Essex Bank*<sup>16</sup> Chief Justice Shaw, after saying that whatever common-law rules, in the absence of any express rule of law, the courts have adopted, to determine what action constitutes the actual transfer of shares, when the transfer is so regulated, such law must govern, held that an express provision in the act of incorporation of a bank that the stock should be transferable only at its banking house and on its books, makes a transfer at the bank imperative as against an attaching creditor without notice of previous assignment and delivery of the certificate to a purchaser. The reasoning was to the effect that it is necessary to fix some act and some period of time at which the property changes and vests in the vendee, and that by the charter the transfer at the bank is made the decisive act of passing the property—the legal, transferable, attachable interest.

From the cases cited and quoted from, it will be observed, that the courts of the several states are not entirely harmonious in their holdings upon this question. The majority of the courts, however, have held that a transfer of stock unrecorded, upon the books of the company, is not valid as against creditors of the seller when the charter or by-laws of the corporation or the statutes of the state require such record; this is upon the theory that nothing short of a compliance with the provisions of the charter, by-laws and statutes of the state would be a constructive notice of such transfer, or sufficient to validate the transaction as to creditors or *bona fide* purchasers.<sup>17</sup> But the

<sup>15</sup> *Colt v. Ives*, 31 Conn. 25.

<sup>16</sup> 5 Gray, 373.

<sup>17</sup> *Parrott v. Byers*, 40 Cal. 614; *Nagler v. Pacific Wharf Co.*, 20 Cal. 629; *People v. Elmore*, 35 Cal. 653. In Massachusetts by the passage of the statute in that state regulating the transfer of stock, the courts seem to have held differently where the charter of the corporation provides the

manner in which stocks should be transferable, and where that mode of transfer was simply provided in its by-laws. Where the charter regulated the manner of transfer, it was held that this mode must be followed to pass a good title against attaching creditors. *Fisher v. Essex Bank*, 5 Gray, 373; *Rock v. Nichols*, 3 Allen, 342; *Blanchard v. Dedham Gas Co.*, 12

courts of all the states would undoubtedly feel compelled to hold that an actual notice that a transfer had been made by delivery of the stock duly assigned, with power of attorney to transfer upon the books, although unregistered, would be as effective as though the transfer were registered, and would supersede the rights of creditors attaching with full knowledge of such transfer.<sup>18</sup>

It will no doubt be necessary to examine the statute of the state in which the contract is made in order to determine the rights of the pledgee in each instance; the statutes and the holdings of the courts of the different states being so varied that it is impossible to lay down any fixed rule governing all transactions.

§ 252. **The pledgee of stock by indorsement may transfer the title.**—As has been said, when the stock is indorsed in blank and delivered to the pledgee as a pledge, he may write over the indorsement the direction and power necessary to warrant the transfer of the stock upon the books of the company, and, as we have seen, he thus becomes at least the apparent actual owner of the stock, having all the *indicia* of ownership of the same; he is therefore enabled to confer upon a *bona fide* purchaser, paying value for it, a good title even as against the true owner. Such a title as between the owner and the pledgee rests upon the doctrine of estoppel; the true owner having conferred upon the apparent owner, by a written transfer, all the *indicia* of ownership of the stock, is estopped from impeaching the title thus conferred and asserting his own title; the rule being well established, that, as between two innocent par-

Gray, 213. Where only the by-laws of the corporation make such provision, a transfer of stock without registration or transfer upon the books, held good against attaching creditors without notice. *Sergeant v. Essex Ry. Co.*, 9 Pick. 202; *Sergeant v. Franklin Ins. Co.*, 8 Pick. 90. See also *Sibley v. Quinsigmond Nat. Bank*, 133 Mass. 515; *Shipman v. Ætna Ins. Co.*, 29 Conn. 245; *Oatis v. Gardner*, 105 Ill. 435; *Cheever v. Myer*, 2 Vt. 66.

<sup>18</sup> *Scripture v. Francistown Soap Co.*, 50 N. H. 371. In *Newberry v. Detroit, etc. Co.*, 17 Mich. 141, the court held that "a transfer of stock, whether recorded or not, conveys the interest of the holder, and is valid except as against persons having equities; and a judgment creditor buying at an execution sale with notice of the transfer can get no better title than his debtor had."

ties, he who has made it possible for another to commit the wrong must suffer; and it has been held, "first, that the possession of certificates of corporate stock, which bear the proper indorsement, is *prima facie* evidence of ownership, and that the holder for value without notice of prior equities obtains a perfect title as against such equities; second, if the rightful owner has invested another with the usual evidence of title or an apparent authority to dispose of the stock, he will be estopped from making any claim against an innocent purchaser dealing on the faith of such apparent ownership or right of disposal."<sup>19</sup> But in such case the pledgor is not without remedy; if the pledgee has disposed of the stock, the pledgor may bring an action against him for conversion, and recover its value. If the stock is still in the hands of the pledgee, or if it has been transferred to a third person having notice of the equities of the pledgor; that is to say, one who has notice of the fact that the stock is held as a pledge, and was not intended to be transferred by a sale to the pledgee; the pledgor in such case could sustain a bill in equity against the pledgee and such third persons so holding the stock with notice, and the court of equity would declare that the stock was held as a pledge and not by reason of actual transfer. The maxim in equity would apply, "Equity regards substance rather than form;" and although the transfer upon its face might be absolute, or even have gone so far as to have been transferred to the pledgee upon the books of the company, still the court of equity would declare that such transfer was but a pledge, and, if new certificates of stock had been issued, would decree their cancellation, and that certificates upon the redeeming of the pledge be issued to the pledgor.

In the case of *Brick v. Brick*,<sup>20</sup> Field, J., in the opinion of

<sup>19</sup> Walker v. Detroit Transit Ry. Co., 47 Mich. 338. See authorities cited by the court at page 347; also brief of counsel. In *Gurley v. Reed*, 190 Mass. 509, the owner delivered stock indorsed in blank to another to pledge, permitting him to have the stock transferred to himself and take a new certificate; the person thus entrusted pledged the stock to a *bona fide*

pledgee for his own debt and money advanced. Held that the owner could not recover his stock until he paid the debt for which it was pledged.

<sup>20</sup> 98 U. S. 514; *Hughes v. Edwards*, 9 Wheat. 489; *Russell v. Southern*, 12 How. 139; *Pierce v. Robinson*, 13 Cal. 116. In the case of *Newton v. Fay*, 10 Allen, 505, the court enters into a full dis-

the court, said: "In the late case of *Peugh v. Davis* (96 U. S. 336) we stated the doctrine of equity on this subject. Where an instrument was in the form of a conveyance, but was in fact intended as a security, and though the instrument there was a deed of real property, the principle applies when the instrument purports to transfer personal property. A court of equity, we there said, looks beyond the terms of the instrument to the real transaction, and when that is shown to be one of

cussion of this question. Chapman, J., in rendering the opinion, says: "The policy of courts of equity has been from the earliest time to protect debtors, whom they regard as the weaker party, against being wronged or oppressed by creditors, whom they regard as the stronger party. Their method of interference has been by preventing the creditor from maintaining his title according to the legal effect of his conveyance whenever it was inequitable for him to do so. Therefore, it was held in *Howard v. Harris*, 1 Vern. 190, that if a mortgage is made by its terms irredeemable, or the redemption is restricted, such restrictions are disregarded. In *Spurgeon v. Collier*, 1 Eden, 55, the same doctrine was held, and Lord Northington said that a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. In *Vernon v. Bethell*, 2 Eden, 110, parol evidence was admitted to prove that an absolute conveyance of an equity of redemption of real estate was made as security for a loan and for no other consideration, and the vendor was permitted to redeem. The court said that necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the

crafty may impose upon them. When such parol evidence has been admitted, it has not been regarded as inconsistent with the statute of frauds. In *Walker v. Walker*, 2 Atk. 98, Lord Hardwicke said it had nothing to do with the statute of frauds. In *Kunkle v. Wolfersberger*, 6 Watts, 126, Gibson, C. J., said the proof raises an equity consistent with the writing. It seems to be regarded as an inquiry into the consideration of the sale, for the purpose of doing equity between the parties. The rule on this subject and the reason of it are fully and clearly stated by Mr. Justice Curtis in *Russell v. Southard*, 12 How. 139. He says: 'To insist on what was really a mortgage as a sale is in equity a fraud which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.' He cites several English as well as American authorities to sustain this position. In the prior case of *Morris v. Nixon*, 1 How. 126, the same doctrine had been before held, and in *Babcock v. Wyman*, 2 Curtis, C. C. 386; S. C., 19 How. 289, it was re-affirmed. The case of *Russell v. Southard* came up from Kentucky, and Mr. Justice Curtis says: 'It is suggested that a different rule is held by the highest court in Kentucky. If it were,

security and not of sale it will give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import; it must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made

with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted or rejected not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles.' But he cites the case of *Edrington v. Harper*, 3 J. J. Marsh. 355, where it was held that the fact that the real transaction between the parties was a borrowing and lending will, whenever or however it may appear, show that a deed absolute upon its face was intended as a security for money, and whenever it can be ascertained to be a security for money, it is only a mortgage. Mr. Justice Story had held the same doctrine at a still earlier period. He held that parol evidence was admissible to show that an absolute deed was intended as a security for money, and that such a deed should be treated as a mortgage, whether the defeasance was omitted by fraud, mistake or accident, or by design, upon mutual confidence between the parties; for he says the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust,

against conscience and justice. *Taylor v. Luther*, 2 Sumner, 228; *Jenkins v. Eldridge*, 3 Story, 293. The same rule has long been held in New York and on the same ground. *Strong v. Stewart*, 4 Johns. Ch. 167, was decided by Chancellor Kent on the strength of several English authorities cited by him. See also *Slee v. Manhattan Co.*, 1 Paige, 48; *Van Buren v. Olmstead*, 5 Paige, 9. In the latter case the rule is said to be well settled. After considerable discussion it was settled that the rule was limited to cases in equity, and did not prevail in courts of law. *Webb v. Rice*, 1 Hill, 606; *Hodges v. Tennessee Ins. Co.*, 4 Selden, 416. But by the code parol evidence is made admissible both at law and in equity to show that an assignment, though absolute in its terms, was a security for a loan or an indemnity against a liability, and is therefore a mortgage. *Despard v. Walbridge*, 15 N. Y. 374. In *Wright v. Bates*, 13 Vt. 341, the court say: 'It is well settled in this state that a court of chancery will treat an absolute deed of real estate, given to secure the payment of a debt, as a mortgage, as between the immediate parties, especially if the grantor continues to remain in

to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdic-

possession, though the defeasance rests wholly in parol.' But where the possession has followed the deed through several grantees, such evidence is held inadmissible. *Conner v. Chase*, 15 Vt. 764. And in this last case, Williams, C. J., argues against the rule itself. In a note to 2 Cruise Dig. (Greenl. ed.), tit. XV, ch. 1, sec. 20, it is said that 'in Maine and Massachusetts the statutes recognize only two modes of creating a mortgage to which the chancery jurisdiction of the courts extends, namely, by proviso inserted in the deed, and by a separate deed of defeasance. All equitable mortgages created by contract of the parties seem, therefore, to be excluded. Relief, if any, in other cases must be referred to the head of fraud, trust, or accident and mistake.' Since the publication of that work relief has been afforded under this head in a case where an absolute deed was alleged to have been intended as a security for a debt, and where the answer and proof showed the intention. *Howe v. Russell*, 36 Me. 115. No case has arisen in this commonwealth where this court could consider whether it would adopt the rule of equity admitting parol evidence to prove that an absolute deed was given as security for a loan or for indemnity. For though the court has had jurisdiction of trusts for many years, yet the jurisdiction has been strictly construed, and has been held not to extend to trusts created by converting a

fraud into a trust. *Mitchell v. Green*, 10 Met. 101. As a mortgage is not strictly a trust, but the element of fraud is held to enter into the attempt to convert it into an absolute sale, the court could not, prior to 1855, have entertained jurisdiction of such a case. The present case does not require us to decide whether the rule ought to be adopted here in application to a mortgage of real estate. But in respect to the transfer of stocks, which requires but little formality between the parties, and is often made in the hurry of business, as a bill of parcels is made, and as to which a trust may be created and proved by parol, and which is to be regarded as a pledge rather than a mortgage, when used as a collateral security, we think the principle of equity jurisdiction so fully established elsewhere in regard to instruments much more formally executed ought to be adopted, admitting oral proof as to the consideration and purpose of the transfer, and that, upon the discharge of the debt or duty secured by it, the pledgor should be permitted to redeem." Transfer of mortgage as collateral, absolute in form, held to be a pledge. *Barber v. Hathaway*, 169 N. Y. S. 575. And where certificates of stock were pledged and delivered and afterwards repledged, the possession of the first pledgee might be considered possession of the second through agency of the pledge. *First Nat. Bank v. Bacon*, 98 N. Y. S. 717.

tion, which will always be asserted to prevent fraud or oppression and to promote justice." But in such case it is only the *bona fide* purchaser that can take a valid title of the stock from the pledgee. A purchaser who has no knowledge of the real facts as to the pledgee's holding the stock, and where there is nothing upon the face of the certificates which would put a reasonably prudent man upon inquiry; as, for example, if upon its face the certificates of stock were charged with a trust; or if there was acknowledged upon the part of the person taking such stock from the pledgee that the stock was charged with the trust, or if upon the face of the stock it appeared that the stock was fictitious, the purchaser could not claim to be a *bona fide* holder.

#### BILLS OF LADING.

§ 253. Bills of lading subjects of pledge.—A bill of lading is defined to be a written acknowledgment signed by the common carrier that he has received the goods therein described from the shipper to be transported on the terms therein expressed to the described place of destination, and there to be delivered to the consignee or parties therein designated. By it the common carrier contracts to carry and deliver goods to the consignee, or to the order of the shipper. It will be borne in mind that the property described in the bill of lading is in the possession of the common carrier for the purpose only of delivery to the consignee. It has been said that a bill of lading is a symbol of property, and when properly indorsed operates as a delivery of the property itself, investing the indorsee with a constructive custody which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery under and in pursuance of the bill of lading to the person entitled to receive the property.<sup>21</sup> It may therefore be said that a bill of lading is in the nature of a *quasi*-negotiable instrument, and that long-continued custom and the usages of trade have given to it distinctive characteristics, among which are, that a transfer of the property may be effected by an indorsement of the bill by the consignee to whomsoever he desires to deliver the property, and that the same rules would apply to a bill of lading

<sup>21</sup> *Hieskell v. Farmers' Bank*, 89 Pa. St. 155; *Dows v. National Exchange Bank*, 91 U. S. 618, 629.



as those which have been already discussed with reference to negotiable instruments. We have only to consider here whether a bill of lading is the subject of a pledge, and to what extent its indorsement and delivery for that purpose is necessary to create a pledge to secure the discharge of some obligation or the payment of a debt. If indorsement and delivery of the bill of lading is sufficient to transfer the possession and title of the property, it is certainly sufficient to transfer to the pledgee a possession to be held in pledge for the performance of an obligation or the payment of a debt.

In *Pollard v. Vinton*,<sup>22</sup> Miller, J., in delivering the opinion of the court took occasion to speak of the character and effect of a bill of lading, and used this language: "A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated because it has come into the hands of persons who have innocently paid value for it; the doctrine of *bona fide* purchasers only applies to it in a limited sense. It is an instrument of a twofold character; it is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver."

§ 254. **Delivery by the pledgor.**—It follows from what has been said that the pledgor, to create a pledge of the bill of lading, or the property which it represents, must deliver the bill with such transfer or assignment of the same as will be necessary to give to the pledgee possession and control of the property represented by the bill of lading. Whatever is necessary to be done in order to bring this about must be done in

<sup>22</sup> 105 U. S. 7.

order to create the pledge. By usage and custom it has come to be recognized that a bill of lading may be transferred by delivery and indorsement in blank by the owner to the transferee, if it be the intention of the parties by such delivery to make the transfer. Hence it may be said that the owner of the property, or the consignee of the property, if it is consigned to another person than the owner, may pledge the property by indorsing the bill of lading in blank and delivering it to the pledgee with the intention of creating the pledge. And so it has been held that a pledge of the bill of lading, drawn to the order of the pledgor, may be created by mere delivery to the pledgee.

In *First Nat. Bank v. Dearborn*<sup>22</sup> it was held: "The delivery by an owner of goods of a common carrier's receipt for them, not negotiable in its nature, as security for an advance of money, with the intent to transfer the property in the goods, is a symbolical delivery of them, and vests in the person making the advance a special property in the goods sufficient to maintain replevin against an officer who afterwards attaches them upon a writ against the general owner." It has also been held that a bill of lading stands in place of the property covered by it. It represents the property. When the right of possession is changed by a sale or pledge of the property itself, the transfer of the bill of lading operates as a change of possession of the property, the carrier in the meantime being the custodian for the real owner or party in interest. While the bill of lading is not a negotiable instrument in the sense in which a bill of exchange or promissory note is negotiable, yet, as the representative of a valuable commodity, it is assignable to the party entitled to control the possession of that commodity to the same extent and for the same purposes as the property itself would be, if corporeal, personalty. Inasmuch, therefore, as these in-

<sup>22</sup> 115 Mass. 219. The following authorities are cited in the opinion; *Tuxworth v. Moore*, 9 Pick. 347; *Fettyplace v. Dutch*, 13 Pick. 388; *Whipple v. Thayer*, 16 Pick. 2; *National Bank v. Crocker*, 111 Mass. 163. Where the bill designated no conveyance, and contained the words "this receipt is not transferable," it was held that

the transfer by delivery vested a special property in the transferee. *Peters v. Elliott*, 78 Ill. 321; *Tiedeman v. Knox*, 53 Md. 612. In the latter case it was held that "where one paid a draft, receiving the bill as security, the title to the goods became vested in him."

struments are capable of performing very important functions in commercial transactions, innocent holders thereof for value ought to receive the same protection as if they held possession of the property itself.

§ 255. *Mere delivery of the bill sufficient.*—A mere indorsement of the bill of lading without delivery would not transfer the property.<sup>24</sup> Delivery seems to be an absolute requisite to the creation of a pledge of the property. The important essential in this class of cases is that there be evidence of intention upon the part of the pledgor, or in case of a bill of lading on the part of the owner or consignee, to deliver the property represented in the bill of lading; that intention is evidenced by the delivery of the bill for the purpose of creating the pledge or delivering the property; and it is held that a mere delivery of the bill of lading, with intention by it to deliver the property, or to create a pledge, is sufficient, and that a written indorsement is not absolutely necessary.<sup>25</sup> In this case the

<sup>24</sup> In *Buffington v. Curtis*, 15 Mass. 528, it was held: "The mere indorsement of a bill of lading without a delivery of it does not transfer the property in the goods." *Lickbarrow v. Mason*, 2 T. R. 63.

<sup>25</sup> *Mich. Cent. R. Co. v. Phillips*, 60 Ill. 190; *Western Ry. Co. v. Wagner*, 65 Ill. 197; *Allen v. Williams*, 12 Pick. 297; *Green Bay First Nat. Bank v. Dearborn*, 115 Mass. 219; *Jeffersonville R. Co. v. Irvin*, 46 Ind. 180; *Becker v. Hallgarten*, 86 N. Y. 167, 175; *Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. —; *Merchants' Bank v. N. R. R. T. Co.*, 69 N. Y. 376, 379–99; *City Bank v. Railroad Co.*, 44 N. Y. 136; *Holmes v. German Security Bank*, 87 Pa. St. 525; *Holmes v. Bailey*, 92 Pa. St. 57; *Richardson v. Nathan*, 167 Pa. St. 513; *Schraff v. Meyer*, 133 Mo. 428, 42 Cent. Law Jour. 367. In the latter case the court held: "The transfer of a bill of lading by delivery without indorsement

carries with it all the rights of the transferee in the goods represented by it, and extrinsic evidence is admissible to show what such interest is. The fact that the state statute provides for the transfer of bills of lading by indorsement does not restrict that transfer to such method. Where a contract for sale of goods shows that they were to be delivered at the termination of a carrier's lien, their delivery by the seller to the carrier, though consigned to the buyer, will not pass the title, and a transfer of the bill of lading by the seller will vest the transferee with the right of possession of the goods. But where delivery to the carrier operates under the contract of sale to pass title to the buyer, the retention and transfer of the bill of lading by the seller will carry no right in the goods, though by statute the carrier is forbidden to deliver the goods without the presentation of the bill of lading."

court say: "In legal effect and for the purpose of explaining what is to be done with the merchandise, there can be no substantial difference between a bill of lading and a carrier's receipt. We have in this case an intent of the general owners of the flour to make use of it as a security for an advance of money from the plaintiff; a delivery of the bill of lading in pursuance of that intent, and a valuable and executed consideration in the discounting of the draft. The fact that the goods were in the custody of the defendant would not prevent this arrangement from having the effect to transfer the title of consignors to plaintiffs. Whether it should be regarded as a sale, a pledge, or a mortgage, there was a sufficient delivery to give to the plaintiffs a special property which they could enforce by suit against any wrong-doer."

In *Merchants' Bank v. N. & R. R. T. Co.* (cited in the note), the court say: "The rule is well settled that property or goods shipped by a bill of lading drawn to order may be transferred by delivery to a third person without any indorsement. Bills of lading are choses in action, and no rule is better established than that instruments of this character may be transferred for a valuable consideration by delivery only." But it has been held, where the bill of lading makes the goods deliverable to the person named as consignee, and there are no words of negotiability, then in such a case the mere delivery of the instrument, when it is intended to have the effect to transfer the title to the goods described in it, will be sufficient to transfer the title. And where the bill of lading is drawn to order, this will not prevent a transfer of the property to a third person by a mere delivery of the bill.<sup>26</sup>

In *Emery Sons v. Irwin Nat. Bank*,<sup>27</sup> the court say: "By the rules of commercial law, bills of lading are regarded as symbols

<sup>26</sup> *City Bank v. R. W. & O. R. Co.*, 44 N. Y. 136. The court held that "delivery of a bill of lading with intent to pass the title has that effect, although the bill is drawn to order and is not indorsed." The court say: "I suppose, however, that the title to the wheat passed to the plaintiff by the delivery of the bill of lading. The delivery of a bill of

lading with intent to pass the title has that effect, although it be not payable to 'assigns,' or, if so payable, it be not indorsed." *Par. Mer. Law*, 346; 2 *Kent's Com.* 207.

<sup>27</sup> 25 *Ohio St.* 360. A full discussion may be found in *Neill & Ellingham v. Produce Co.*, 41 *W. Va.* 37.

of the property therein described, and delivery of such bill by one having an interest in, or a right to control, the property, is equivalent to a delivery of the property itself. A consignor who has reserved the *jus disponendi* may effectuate a sale or pledge of the property consigned by delivery of the bill of sale to the purchaser or pledgee, as completely as if the property were in fact delivered. If such transfer of the bill of lading be made after the property has passed into the actual possession of the consignee, the transferee of the bill takes it subject to any right or lien which the consignee may have acquired by reason of his possession. But if the bill of lading be transferred by way of sale or pledge to a third person before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolical delivery of the property to him."

§ 256. **Bill of lading to consignee with draft attached.**—It is a customary course of business for the shipper or owner of the property to consign the property shipped to some person upon payment of draft attached, intending thereby to consign the property to such person as security for the amount paid upon the draft, or to transfer to him the title of the property. Now, if in such case the consignee accepts and pays the draft accompanying the bill of lading, the title of the property will vest in him to the extent of the intention of the parties, and the consignor cannot defeat his interest in the property by assignment to a third person; but if the consignee refuse to accept the draft, then in such case the consignor may confer the title to the property upon some other person, or may pledge the same as security.<sup>28</sup>

<sup>28</sup> In *Marine Bank v. Wright*, 48 N. Y. 1, it was held: "Where the consignor of property, upon its shipment and before delivery, draws a bill of exchange upon the consignee and procures the same to be discounted at a bank upon the security of the bill of lading which is transferred and delivered with it, the bank acquires title to the property described in the bill of lading, conditional upon

the acceptance of the draft; upon such acceptance the title passes to the acceptor; but upon refusal to accept, the title continues unimpaired, and upon the receipt by the consignee of the property and its conversion, he is liable to the bank for the money advanced upon it." *Michigan Cent. Ry. Co. v. Phillips*, 60 Ill. 190; *Illinois Cent. Ry. Co. v. Southern Bank, etc.*, 41 Ill. App. 287; *Chicago*

§ 257. A bill of lading, how far negotiable.—As we have seen, a bill of lading is a contract, among other things, whereby the carrier engages to deliver the goods to the consignee mentioned in the bill. As has been said, bills of lading are regarded as so much cotton, grain, iron or other articles of merchandise described in them. The merchandise is very often sold or pledged by the transfer of the bills which cover it. But they are not negotiable to the extent that bills of exchange and promissory notes are negotiable; they are, in other words, very different from bills of exchange and promissory notes, answering a different purpose and performing different functions. And it has been held that even the statute of a state which undertakes to make them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, thus undertaking to change totally their character and put them in all respects upon the same footing as negotiable bills and notes, would not be sufficient to make them negotiable in the sense that commercial paper is negotiable by the law merchant. This question was before the supreme court of the United States in *Shaw v. Railroad Co.*<sup>29</sup> Strong, J., delivering the opinion, said: "It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." Very many of the states

Fifth Nat. Bank v. Bayley, 115 v. Pfeiffer, 108 N. Y. 242; Peters  
Mass. 228; Hathaway v. Haynes, v. Elliott, 78 Ill. 321.  
124 Mass. 311; Commercial Bank    29 101 U. S. 557, 565.

have undertaken by statute to introduce important changes of the common-law doctrine upon this subject.

§ 258. **Who are bona fide holders of bill of lading.**—It is a universal rule, that one to be a *bona fide* holder must have paid value. So it may be said first of all, that a *bona fide* holder of the transferred bill of lading must have paid value for the property thus transferred. The transfer must be in good faith and without fraud on the part of or to the knowledge of the transferee; and more than that, it must be without the notice or knowledge of facts or circumstances, shown either upon the face of the bill or by extrinsic facts, that would lead a reasonably cautious man to investigate, and if investigated would lead to the discovery of such fraud or defects as would vitiate the transaction. One cannot be held to be ignorant of facts which by reasonable prudence he should know.

§ 259. **Rights of bona fide holders.**—The bill of lading itself, as agreed by all authorities, simply represents property, and its transfer is but a symbolical transfer and delivery of property. It therefore follows that the transfer of the bill of lading to a *bona fide* purchaser, or pledgee, is but a transfer of the property represented by the bill. The transaction can confer no greater right or privilege upon the transferee than would be conferred by dealing directly with the property without the use of the symbol—the bill of lading. For, as we have seen, the bill of lading is not a negotiable instrument in the sense and to the extent of promissory notes and bills of exchange; it does not represent money, but simply represents the specific property described in it.

In *Stollenwerck v. Thacher*<sup>80</sup> it was said: "A bill of lading, even when in terms running to order or assigns, is not negotiable like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of the bill of lading correspond not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances." The holder of a bill of lading, either as indorsee, assignee or otherwise, cannot, unless by statute the negotiability is enlarged, by transfer of the bill of lading, even to a *bona fide* purchaser or pledgee for value, confer

<sup>80</sup> 115 Mass. 224; *Shaw v. Railway Co.*, 101 U. S. 557; *Dow v. Green*, 24 N. Y. 638.

any greater right or better title than he himself has; and so if the transferror of the bill has no title he can confer none upon his transferee.<sup>31</sup>

§ 260. *Bona fide holder from agent of owner or one having apparent title.*—A *bona fide* purchaser or pledgee obtaining his interest in the property through purchase from, or pledge by the authorized agent of the owner, would stand in no different position than he would if he had purchased or obtained his pledge from the owner himself. But if it should transpire that the transferror was a special agent of the owner, that is, had the property only for a specific purpose and was not a general agent of the owner, and the pledge or transfer was not in the execution or along the line of the ordinary business of the agency or the carrying out of the specific purpose, then in such case no title or legal interest would be conferred upon the *bona fide* holder; but if the owner of the property had conferred upon the person from whom the *bona fide* purchaser or pledgee had obtained his interest the apparent right to the property as owner, or the apparent right to dispose of the property, then in such case the owner would be estopped from claiming title as against such *bona fide* purchaser or pledgee. This doctrine rests upon the principle of estoppel; the owner being estopped from asserting any title in himself that would be antagonistic to the title or interest he has conferred. “A *bona fide* holder can only resist the claim of the owner of the property by establishing an equitable estoppel founded upon the acts of the owner. It is the application of that rule by which, as between two persons equally innocent, a loss resulting from the fraudulent acts of another shall rest upon him by whose acts and omissions the fraud has been made possible. This rule, general in its terms, only operates to protect those who, in dealing with others, exercise ordinary caution and prudence, and who deal in the ordinary way and in the usual course of business, and upon the ordinary evidences of right and au-

<sup>31</sup> Pollard v. Vinton, 105 U. S. 8; Jasper Trust Co. v. Kansas City R. Co., 99 Ala. 416, 42 Am. St. Rep. 75; Haas v. Kansas City R. Co., 81 Ga. 792; Burton v. Curryea, 40 Ill. 320, 89 Am. Dec. 350; Evansville R. Co. v. Irwin, 84 Ind.

457; Farmers' Nat. Bank v. Logan, 74 N. Y. 568; Saltus v. Everett, 20 Wend. 267, 32 Am. Dec. 541; Farmers' etc., Nat. Bank v. Haselton, 78 N. Y. 104; Shaw v. Railway Co., 101 U. S. 557.



thority in those with whom they deal, and as against those who have voluntarily conferred upon others the usual evidences or *indicia* of ownership of property, or an apparent authority to deal with and dispose of it. In such case, for obvious reasons, the law raises an equitable estoppel, and, as against the real owner, declares that the apparent title and authority which exists by his act or admission shall *quo ad* persons acting and parting with value upon the faith of it, stand for and be regarded as the real title and authority. Two things must concur to create an estoppel by which an owner may be deprived of his property by the act of a third person, without his assent, under the rule now considered: (1) The owner must clothe the person assuming to dispose of the property with the apparent title to or authority to dispose of it; and (2) the person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*.”<sup>32</sup>

<sup>32</sup> *Barnard v. Campbell*, 55 N. Y. 456. In the case of *Newhall v. C. P. R. R. Co.*, 51 Cal. 345, it was held that “if the owner of goods sells the same on credit and ships them on a railroad to the vendee as consignee with bills of lading in the usual form, and while the goods are in transit the vendee becomes insolvent, and the vendor notifies the railroad company that he stops the goods; and if after such notification the vendee indorses the bill of lading in the usual course of business to a third person, who in good faith, and without knowledge of the insolvency, or of such notification, advances money thereon, to be repaid out of the proceeds of the goods to be sold by him at auction, the assignee, on tender of freight and charges, is entitled to receive the goods from the carrier, as against the vendor. The

court in the opinion says that “if the bill of lading is assigned, and the legal title passes to a *bona fide* purchaser for a valuable consideration before the right of stoppage is exercised, the lien of the vendor ceases as against the assignee, on the well known principle that a secret trust will not be enforced as against a *bona fide* holder for value of the legal title. In such case, if the equities of the vendor and assignee be considered equal (and this is certainly the light most favorable to the vendor in which the transaction can be regarded), the rule applies that where the equities are equal the legal title will prevail. The vendor has voluntarily placed in the hands of the vendee a muniment of title, clothing him with the apparent ownership of the goods; and a person dealing with him in the usual course of

## THE WAREHOUSE RECEIPTS.

§ 261. **The warehouse receipt as collateral.**—The warehouse receipt is the evidence that certain property therein described is in the care and custody of the warehouseman, held subject to the order of the bailor or owner, and like the bill of lading stands as a symbol for the property itself. It represents grain or cotton, or whatever property it describes, and the fact of its possession is evidence of ownership of the property. For, as we have seen,<sup>22</sup> in due course of business the warehouseman who is the custodian, on receipt of the property for storage, issues the receipt or evidence of the possession of the property to the bailor, and by it he says to the world that upon the delivery of this receipt to him, and payment of charges for storage, he will deliver to the rightful owner, or holder of the receipt, the property itself. Then we may say of this, as has been said of other such like paper, the warehouse receipt, while not negotiable to the extent of standing for a sum of money, or so that it will pass from hand to hand as commercial paper, and subject to all the rules and regulations imposed upon such paper by the law merchant, it is at least *quasi-negotiable*, and often enters into large business transactions, because, by the custom of trade, it stands for the property or thing that is stored with the warehouseman, which will be delivered upon the due presentation of the receipt. It may, however, be said that this receipt has a property value in itself, not represented in money, but by the property or chattels which are in storage. Therefore the warehouse receipt may be the subject of a pledge.

§ 262. **Delivery of the receipt required—Indorsement in blank.**—To the making of a valid pledge, delivery and acceptance are requisites. Usually it is duly assigned by the bailor named in the receipt, to the person who is the pledgee; but like the bill of lading it is not necessary that there should be an assignment of the receipt fully and completely written out. Indorsement in blank with actual delivery is enough; for the rightful holder may write over the indorsement in blank a full and

business, who take an assignment for a valuable consideration, without notice of such circumstances as render the bill of lading not fairly and honestly as-

signable, has a superior equity to that of the vendor asserting a recent lien, known perhaps only to himself and the vendee."

<sup>22</sup> *Ante*, § 174.

complete assignment, and in this way convert the property which it represents to his possession. Indeed, this is the mode most usually adopted when it is desired to pledge a warehouse receipt as collateral security; for in such case it is not the object or desire of the parties to disturb the custody of the property itself, or that the pledgee should take actual manual possession of the property. The receipt may represent a large quantity of grain, for example, stored in a warehouse; the object of the pledgor is simply to use this receipt, the evidence of his ownership, as security for a loan of money, or as collateral to his note or other obligation; he has no intention of transferring the title to the property. Upon payment of the debt, or fulfillment of the obligation, it is incumbent upon the pledgee to return the receipt which is the subject of the pledge; and so, because of the convenience in doing business, the custom has grown up to simply transfer to the pledgee the receipt for the stored property indorsed in blank, to be returned upon the full performance of the obligation for which it is pledged, and generally without any assignment being fully written over the indorsement in blank; for the delivery of the receipt thus indorsed, with the intention of pledging the same, has the same effect as the delivery of the property itself.<sup>84</sup>

**§ 263. — Pledge created by mere delivery of receipt.**—There is no particular form necessary for the transfer of the receipt. The mere delivery of the receipt, with the intention of creating the pledge, as between the parties, is enough to create an equitable lien, and by virtue of it the pledgee can hold the property described in the receipt and the owner or pledgor would be estopped from asserting any right inconsistent with the pledge.<sup>85</sup>

**§ 264. Statutes of states with reference to pledgee of warehouse receipt.**—Many of the states have enacted statutes regulating the transfer of warehouse receipts, and it will be necessary to examine the statute of the particular state where the transaction occurs.' We have not the space to notice and quote these statutes here. It may be said, however, with reference to

<sup>84</sup> Jones on Pledges, sec. 280. See cases cited. *Freiburg v. Dreyfus*, 135 U. S. 478; *Burton v. Curryea*, 40 Ill. 320. In *Citizens' Bank v. Peacock*, 103 Ga. 171, 29 S. E. 752, it was held that the delivery

of the warehouse receipt for cotton is in effect delivering the cotton itself.

<sup>85</sup> *Blanc v. Germania Nat. Bank*, 114 La. 739, 38 So. 537.

these statutes, that although they may purport to make the warehouse receipt negotiable, all that can in fact be done is to cut off any defense which the indorser may have. The holder of the receipt takes no better title than he would had the goods and chattels described been actually delivered to him; and to allow the transfer of the receipt merely to pass an absolute title without this limitation would enable one fraudulently depositing the goods of another to dispose of them and confer a valid title, even as against the true owner, by obtaining a warehouse receipt in his own name. Certainly this would be against public policy.<sup>36</sup>

§ 265. — **If the receipt is made to bearer.**—It goes without saying that if the receipt stipulates that the property is to be delivered to bearer, then, in order to transfer it, it would not be necessary to indorse the receipt, but the mere delivery of the receipt would be sufficient to transfer the title to the property if it was made with that intent. It therefore follows that such a receipt may be made the subject of a pledge by merely delivering the receipt with intention to pledge it as collateral security for the payment of the debt or the fulfilling of the obligation.<sup>37</sup>

#### INSURANCE POLICIES.

§ 266. **Insurance policies as collateral.**—An insurance policy that is in force has a property value, depending, of course, very largely upon the stipulations in the policy; and such a policy is often made the subject of a pledge; as, for example, a fire insurance policy is often assigned with a real-estate mortgage

<sup>36</sup> Warehouse receipts are not negotiable instruments in a commercial sense. And in the absence of a right of property in the consignee and a power to sell, the consignee, by indorsement, cannot confer title to the property as against the true owner. *Dows v. Perrin*, 16 N. Y. 333. Warehouse receipts at most only represent the goods, and may be used upon a sale as a symbolical delivery. 3 *Ellis & Bl.* 622. A transfer of the receipt operates as a delivery of the goods so long as the goods

remain in the possession of the warehouseman. In fact, the possession of the receipt is in legal effect the possession of the goods, and enables the holder of the goods to transfer his title to the goods without an actual manual delivery of the goods themselves. They did not add to his title, they simply gave him the possession. *Lickbarrow v. Mason*, *Smith's Lead. Cas.* 755; *Second Nat. Bank v. Walbridge*, 19 *Ohio St.* 419.

<sup>37</sup> *Jones on Pledges*, sec. 301

given upon the same premises; and a stipulation written upon the policy with the consent of the company and by its agent, making any loss payable to the mortgagee to the extent that his interest may appear, creates a pledge to the beneficiary interest of the policy. A life insurance policy, fully paid up or otherwise, is often pledged to the lender of money, or as security for the performance of an obligation by the owner of the policy; and as we shall see, the pledgee thereupon obtains an interest in the policy which the company must recognize. The fact of the policy being the subject of a pledge is not as troublesome as is the procedure in given cases to create the pledge and determine the liability.

§ 267. — **Delivery a requisite.**—A pledge, from its very nature, as we have often seen, requires a delivery and acceptance for the purpose and with the intention of creating a pledge. The same rule obtains in the pledging of policies of insurance; the pledgee must have the property pledged in his possession and control, and a mere promise to deliver the property is not enough. If such a promise were founded upon a valuable consideration, a contract to pledge might furnish a cause of action if the pledgor failed to perform his contract; but that question we are not discussing. The promise to pledge does not create a pledge; the pledgee must have possession of the property. And so it has been held that the mere promise of a policy as collateral is not a good delivery.<sup>28</sup>

The vice-chancellor, in *Spencer v. Clark* (cited and quoted from in the note), calls attention to the familiar doctrine "that as between two persons whose equitable interests are of precisely the same nature and quality, and in that respect precisely equal,

<sup>28</sup> *Spencer v. Clark*, L. R. 9 Ch. Div. 137. The holder of a policy of insurance on his own life deposited it with A. by way of equitable mortgage to secure a loan. A. retained the policy, but gave no notice to the company; B. afterwards, in ignorance of this prior mortgage, agreed to loan money to the policy-holder upon a deposit of the same policy, and the policy-holder alleging that he had left the policy at home by

mistake, and promising forthwith to deliver it to B., took the loan and assigned the memorandum that he had deposited the policy with B., and then undertook, on request, to execute to B. an equitable mortgage of it. B. gave to the company notice of his loan and memorandum of deposit, and frequently applied to the policy-holder for the policy; but the policy-holder made various excuses for not handing it over, and

the possession of the deeds gives the better equity." And so the authorities and adjudicated cases on this subject are replete with the doctrine that to effect a valid pledge of a policy of insurance, delivery and acceptance, with the intention of creating the pledge, is an absolute requisite; except, of course, in cases where a regular assignment has been fully made for the purpose of pledging the policy, and the company has been notified, and a transfer made on their books; or in case the transfer has been made, the company notified, and a custodian agreed upon by all the parties for the purpose of creating the pledge. But there must be something that will operate to place the policy under the obligation of the pledge, and in the control and custody either of the pledgee or his agent.

§ 268. — **How delivered.**—There is no question that if the policy is assigned and delivered to the pledgee, the company notified, and the assignment entered upon its books, for the purpose of creating a pledge, that a valid pledge of the policy is made; and in case of loss, recovery could be had against the company by the pledgee. A very much less formal transfer, however, is sufficient. The courts have held that a pledge of the policy may be created by indorsement in blank and delivery.

§ 269. **By indorsement in blank and delivery**—An indorsement in blank, and delivery and acceptance for the purpose of creating a pledge, has been held to be sufficient. In the case of *Norwood v. Guerdon*<sup>29</sup> the supreme court of Illinois very emphatically laid down this doctrine. That was a case where the husband had procured his life to be insured for the benefit of his wife. She afterwards indorsed the policy to him in blank, left it in his possession, and he secured a loan upon the policy, pledging it as collateral security. The court say: "Armed with this evidence of his right to pledge the instrument, he goes upon the money market and does pledge it, first to one person and then to another, and by such pledge raises money and pays his debts. It is not in evidence, and we cannot

died leaving it in the possession of A. Held, that the circumstances of the case were such as to put B. on inquiry as to the time of the loan, and to fix him with constructive notice of A.'s

security, and that the title of A. as in possession of the policy must prevail over that of B., although B. did, and A. did not, give notice to the company.

<sup>29</sup> 60 Ill. 253.

presume, that the wife ever had any interest in this policy from having contributed from her separate estate toward the payment of the premium. . . . But whatever her interest, by indorsing the policy in blank and delivering it to her husband she clothed him with all necessary evidence of a power to pledge the instrument by filling up her blank assignment, and we should be opening a door to the grossest fraud if we were to permit the wife, after having done all this, to come forward and claim that her husband had no right to assign the instrument. These assignments are valid, and are recognized by the companies. They are also of daily occurrence in the way of collateral security; and where a policy is made payable to the wife, and she indorses it in blank, and the husband pledges it, we are wholly at a loss to conceive upon what ground it can be claimed that such an assignment is not valid in a court of equity." The indorsement in blank and the delivery of the policy to secure the debt, intending it for security, the giving up of the amount loaned to the pledgor, or the receiving it and furnishing the consideration by the pledgee, will make out a case of pledge, and will give to the pledgee all the title, right and privileges to the extent of his pledge which the pledgor had.

#### NOTES, BONDS, MORTGAGES.

§ 270. *Notes and mortgages, and bonds and mortgages.*—A note or bond secured by a mortgage carries with it the mortgage security; so when the note by indorsement and delivery, or by mere delivery when indorsed in blank or payable to bearer, is transferred, it carries with it in equity the mortgage security. It is not necessary that there should be an assignment of the mortgage; the indorsee of the note is entitled to the benefit of the mortgage unless there is special provision to the contrary.

In *Carpenter v. Longan* <sup>40</sup> it was held that "the assignment of a note underdue raises the presumption of the want of notice,

<sup>40</sup> 16 Wall. 271; *Ober v. Gallagher*, 93 U. S. 199; *New Orleans Canal and Banking Co. v. Montgomery*, 95 U. S. 16. "In the absence of proof to show when promissory notes were transferred

by the payee, the law presumes that they were, when underdue, taken in good faith by the transferee without notice of any infirmity attaching to them, and he is entitled to the benefit of the

and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was non-negotiable, or had been assigned after maturity. The question presented for our determination is whether an assignee, under the circumstances of this case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. The contract as regards the note was that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract. To let in such a defense against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger.' . . . The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien. . . . All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has mis-

deed of trust given to secure them." Powell on Mortgages, 908; 1 Hill on Mortgages, 572; Reeves v. Scully, Walker's Ch. 248; Bloomer v. Henderson, 8

Mich. 395; Clcotte v. Gagnier, 2 Mich. 381; Pierce v. Faunce, 47 Me. 507; Taylor v. Page, 6 Allen, 86; Cornell v. Hichens, 11 Wis. 368; Croft v. Bunster, 9 Wis. 508.



led many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*"

If the debt is evidenced by a non-negotiable bond the case would be different as to equities, and the pledgee would be in the same position as though a non-negotiable security had been pledged. Bonds, however, are sometimes made negotiable when the rule applicable to negotiable paper would apply. If the mortgage, then, is to secure the payment of a negotiable note or a negotiable bond, it may be transferred and delivered, and the same rights and privileges would obtain in the case of a pledgee as in case of a purchaser; and if the note or bond were underdue at the time of the pledge, the pledgee would take it freed from equities of which he had no actual notice; but if the mortgage secured a non-negotiable instrument, then the pledgee would take it subject to equities the same as other non-negotiable properties.

§ 271 **Mere delivery as a pledge.**—In either case the note and mortgage, or bond and mortgage, may be delivered as a pledge without assignment or indorsement, and the pledgee would obtain an equitable interest in the security which could be enforced. But the note or bond which represents the indebtedness must be delivered with the mortgage. "The mortgage security alone, without the personal evidences of debt, conveys no right or title to the assignee and is a nullity. The mortgage itself, without the debt to sustain it, has no reason for existence; when the debt is paid it loses its vitality as a valid instrument. The only effect of the assignment of a mortgage by a mortgagee, where given to secure the payment of negotiable collateral notes which have passed into possession of third persons, indorsees, for value, is to create a *quasi* or secondary trusteeship on the part of the assignee in favor of the indorsees of the paper, the payment of which is secured thereby. And this trusteeship is, upon occasion, enforced by courts of equitable jurisdiction. The assignee of a mortgage security, without

more, obtains no title or interest therein.”<sup>41</sup> If the note or bond, however, be pledged, it will carry with it, as we have seen, the mortgage security.

§ 272. **Full, complete assignment and transfer—A pledge or a sale.**—The transfer of the note and mortgage is not infrequently made by an absolute assignment; nothing being shown upon the face of the transfer to indicate that it is assigned merely as collateral security for a debt. If it appears that it is a security for the payment of a debt, it would generally, without any further controlling circumstances, be considered as a pledge rather than an absolute transfer of title. At all events, a court of equity would upon proof of the facts (and they may be proven by parol) decree the transfer to be a pledge rather than a sale. The maxim often quoted and relied upon applies: “Equity considers substance rather than form.”

§ 273. **Pledge distinguished from chattel mortgage.**—Generally a pledge is not in writing, but is usually created by a delivery of the property, and continues so long as the property remains in the possession of the pledgee for the purposes of the pledge. It creates a lien upon the property by reason of the delivery and acceptance for the purposes of the pledge. It does not pass the title of the property with a defeasance clause, and ceases when the pledgee gives up his possession of the property. Continued possession on the part of the pledgee is a requisite to a pledge, and when possession is abandoned the pledge will be held to be abandoned. On the other hand, a chattel mortgage is in writing, and upon its face is an absolute sale of the property with a defeasance clause covenanting that in case of performance upon the part of the mortgagor, that is, payment of the debt as stipulated, the sale shall be void. Possession in the case of a chattel mortgage is not a requisite; on the other hand, the possession of the property is generally left with the mortgagor. “The essential difference between a mortgage and a pledge as a matter of right is that in the one case the title

<sup>41</sup> Colebrooke, *Collateral Securities*, 185; *Wanzer v. Carey*, 76 N. Y. 526; *Peters v. Jamestown Bridge Co.*, 5 Cal. 334; *Jackson v. Blodgett*, 5 Cow. 205; *Jackson v. Bronson*, 19 Johns. 325; *Merritt v. Bartholick*, 36 N. Y. 44;

*Dearborn v. Taylor*, 18 N. H. 153; *Delano v. Bennett*, 90 Ill. 533; *Watson v. Hawkins*, 13 Iowa, 547; *Hamilton v. Lubukee*, 51 Ill. 415; *Bailey v. Gould*, Walk. Ch. 478; *Martin v. McReynolds*, 6 Mich. 73.

passes, in the other it does not. But the difference in substance and in fact is, that in the case of a pawn the possession of the article must pass out of the pawnor; in the case of a mortgage it need not; and in determining whether an agreement is a pledge or a mortgage, regard must be had to these two considerations."<sup>42</sup>

In *Tannahill v. Tuttle*<sup>43</sup> it was held that by a mortgage of chattels the whole legal title of the property passes to the mortgagee conditionally, and to defeat such title the mortgagor or those claiming under him must show a performance of the condition. The statutes of the states usually provide that a chattel mortgage, to be effective as against subsequent *bona fide* mortgages or purchasers, or creditors of the mortgagor, must be filed or registered as provided by the statute, and if it is not and there is no actual notice, it will not be valid except between the parties. But in case of a pledge, there is no such thing required; the property pledged being in the possession of the pledgee is notice to all the world of his rights.

<sup>42</sup> *Haskins v. Pattison*, 1 Edm. Sel. Cas. (N. Y.) 201; Schouler on Bailments and Carriers, sec. 167; *Parshall v. Eggert*, 54 N. Y. 18; *Hauselt v. Harrison*, 105 U. S.

401; *West v. Crary*, 47 N. Y. 425.

<sup>43</sup> 3 Mich. 104; *Norton v. Baxter*, 4 L. R. A. 305, note. Pledge distinguished from chattel mortgage.

## CHAPTER IV.

### PLEDGOR'S RIGHTS AND LIABILITIES.

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| <p>§ 274. The purpose of the chapter.</p> <p>275. Pledgor's rights.</p> <p>276. Pledgor of valuable securities—Notes, bonds, mortgages, etc.</p> <p>277. The pledgor may, under certain circumstances, protect the pledged property from injury.</p> <p>277a. Pledgor may transfer the title to the property.</p> <p>278. Pledgor's interest subject to judicial process.</p> <p>279. When the debt secured is barred by statute of limitation.</p> <p>280. When will the statute of limitations run against the pledgor.</p> <p>281. The pledgor's right to redeem.</p> <p>282. As to notice of intention to redeem.</p> <p>283. The pledgor impliedly war-</p> | <p>rants the title of the pledged property.</p> <p>284. Rights, duties and liabilities of the pledgee.</p> <p>285. The possession.</p> <p>286. The pledge an incident of the debt secured and assignable.</p> <p>287. Assignment of secured debt passes equitable interest in pledged property.</p> <p>288. Rights of assignee subject to the contract of pledge.</p> <p>289. May repledge.</p> <p>290. Right to use the pledged property.</p> <p>291. Expenses and profits.</p> <p>292. Liability for loss and damage.</p> <p>293. Payment of debt releases pledged property.</p> <p>294. A tender of the amount due will discharge the lien of the pledge.</p> |
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§ 274. The purpose of the chapter.—The rights and liabilities of the pledgor depend very largely upon the contract which creates the pledge. It may be varied as the parties see fit.<sup>1</sup> The general liability of the pledgor and the pledgee have been

<sup>1</sup> Drake v. White, 117 Mass. 10, 13. The court say: "In the present case the parties have reduced their contract to writing, and have omitted to attach to the defendants' liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of

two things: either to return the property specifically, or to pay for it in money. There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so."

more or less noticed in preceding chapters but not fully discussed. In this chapter it is our purpose to call attention to rules governing these rights and liabilities, and to notice some of the more important applications of the rules to the usual and more common transactions of business; and in this connection it may be said that the reader must at all times keep in mind that a pledge or pawn belongs to that class of bailments known as benefit bailments, where ordinary diligence is required of the parties. No matter what the transaction may be, it is this that fixes and determines the rights of the bailor as well as the bailee; upon this does their liability rest.

§ 275. **Pledgor's rights.**—When once the pledging of the property is completed and the pledgor has released to the pledgee the possession of the same, it becomes the duty of the pledgee to exercise that ordinary care in keeping and caring for the property and in carrying out the object of the pledge that is required in all mutual-benefit bailments. It therefore follows that the pledgor has the right to demand and expect that the pledged property will be properly cared for; that is, that it will have bestowed upon it such care as the ordinarily prudent man would bestow upon his own property of like kind and value under just such circumstances. The pledgor, in other words, has the right to have his property protected and cared for to the extent that the particular property under the circumstances naturally and ordinarily requires; that is to say, if it be property of such kind as requires use in order to be properly cared for, then that it will receive such use as its particular kind requires, and if for want of such use the property is damaged, it follows that the pledgor could sustain an action against the pledgee for not doing his duty in that regard. Whatever is, under ordinary circumstances, required to be done in order to preserve his rights and interests, the pledgor has a right to demand be done by the pledgee. The pledgor is entitled to have the property so used and protected that its value shall not be impaired, and this rests somewhat upon the fact that during the existence of the pledge the property is in the exclusive possession of the pledgee, and it cannot be cared for or protected by the owner thereof, as he is not entitled to its custody. As, for example, if the pledged property be collateral security in the hands of the pledgee, the pledgor has the right to have such securities protected, and if the pledgee, by neglect or want of due care,

loses the securities, or fails to enforce them against the persons liable upon them, and thereby their value is lost or impaired, the pledgor would have an action against the pledgee for such loss or damage.<sup>2</sup>

**§ 276. Pledgor of valuable securities—Notes, bonds, mortgages, etc.**—In these days of business activity it often happens that a borrower places large amounts of valuable securities, such as notes, bonds, mortgages, stocks, etc., in the hands of his banker, or other person from whom he borrows money to secure his indebtedness. To such creditors who thus become bailees of the securities, this rule of ordinary diligence applies; they are bound to exercise that degree of sound judgment which the ordinarily prudent business man would exercise under like circumstances in the carrying out of the purposes of the trust that is imposed upon them by the bailor, and if through negligence they fail to do this and it results in damage to the pledgor, they will be held liable.<sup>3</sup>

<sup>2</sup> Where a note is pledged as collateral security to a debt the pledgor is relieved from collecting it, the pledgee being entitled to receive payment of it, and collect it when due. *C. H. Larkin Co. v. Dawson* (Tex. Civ. App. 1904), 83 S. W. 832; *Hamilton's Ex'r v. Hamilton*, 27 Ky. L. Rep. 298, 84 S. W. 1156; *Scott v. First Nat. Bank* (Ind. Ter. 1904), 82 S. W. 751; *Roberts v. Farmers' Bank*, 25 Ky. L. Rep. 2296, 80 S. W. 441; *Chemical Nat. Bank v. Armstrong*, 50 Fed. 798; *Ramsey v. Laidley*, 34 W. Va. 731, 26 Am. St. R. 935. Where pledgee holds collateral to secure debt and it is lost through the negligence of pledgee to collect it, he is liable to pledgor. *Hanna v. Holton*, 78 Pa. St. 336, 21 Am. Rep. 20; *McQueen's Appeal*, 104 Pa. St. 595, 49 Am. Rep. 592; *O'Brien v. Moffit*, 133 Ind. 660, 36 Am. St. Rep. 566. Pledgee cannot sell note but is bound to collect it. *Joliet Iron Co. v. Scioto*,

etc., Co., 82 Ill. 548, 25 Am. Rep. 341.

<sup>3</sup> *Northwest National Bank v. Thompson Mfg. Co.*, 71 Fed. 113. "A person having notes in his possession as collateral security for a debt is bound, so far as the general owner of the notes is concerned, to use reasonable diligence to protect the security so held and see that it is not outlawed. And where a debtor pledged notes of solvent persons which could with reasonable diligence on the part of the pledgee have been collected at maturity, but thereafter while in the hands of the pledgee the notes became uncollectible because of the insolvency of the maker, held, that in the absence of a showing of diligence the pledgor could recover of the pledgee the amount of the uncollectible collateral. And if in an action on a note the holder fails to produce or account for collateral pledged for its se-

§ 277. The pledgor may under certain circumstances protect the pledged property from injury.—While the law protects the pledgee in the possession of the pledged property, even as against the pledgor during the continuance of the pledge, giving to him the right to recover it if it is taken from him, it places certain duties upon the pledgee, making it incumbent upon him to protect the interests of the pledgor in the property, to the extent, at least, that the property shall not in any wise suffer damage while in his possession.

This right to protect the property does not deprive the pledgor of the privilege of protecting his own interests in case of failure on the part of the pledgee to do so, and whenever it becomes necessary in order to protect himself from loss he may at once proceed without reference to the possession of the pledgee. As, for example, where negotiable paper has been pledged as collateral security, it is the duty of the pledgee to make collection of such paper when it falls due; should he fail, however, to do so to the prejudice of the rights of the pledgor, the pledgor may proceed to the collection of the amount due; or, should it appear that the paper was about to be outlawed, he could bring an action against the maker before the expiration of the statutes of limitation and thus protect his interests. Indeed, it is his right to protect his own interests upon failure of the pledgee to do what is necessary to be done.<sup>4</sup>

§ 277a. Pledgor may transfer the title to the property.—In *Whitaker v. Sumner*<sup>5</sup> the court say: "It seems now well settled that when personal property is under a pledge or lien, whether created by operation of law or by the act of the owner,

curity, the note may be credited with the amount of the collateral. *Mansur-Tebbetts Implement Co. v. Carey et al.*, 45 S. W. 120. In *Anderson et al. v. Carothers et al.*, 18 Wash. 520, a creditor accepted a transfer of sheep as collateral security, agreeing to sell them and retain out of the proceeds the amount of his claim. The court held, in an action brought by a creditor, that carelessness of the pledgee in keeping, and failing to sell the sheep until after the market had fallen, and not properly caring for them,

constituted a ground of counterclaim on an action to recover the debt.

<sup>4</sup> *O'Kelley v. Ferguson*, 49 La. Ann. 1230. "The fact that a party has transferred certain notes held by him to another person as collateral does not withdraw entirely from him the power of protecting his interests by proceeding against the maker of the notes."

<sup>5</sup> 20 Pick. (Mass.) 399; *Tuxworth v. Moore*, 9 Pick. 347; *Fettyplace v. Dutch*, 13 Pick. 388; *Bush v. Lyon*, 9 Cowen (N. Y.), 52.

the general property remains in the owner, and he may transfer it by a proper contract and upon a good consideration, subject only to the lien. And in such case, as the actual custody and possession of the goods for the time being is in the hands of the party having the lien, it follows that a constructive or symbolical delivery is sufficient to pass the property. An order by the vendor upon the keeper, or, if the contract of sale or conveyance be in writing, proper and satisfactory notice of the conveyance by the vendee to the holder, constitutes such constructive delivery. Where goods are lying in a warehouse, although subject to a lien for keeping, notice to the warehouse-keeper, where all the other requisites of a sale are proved, is equivalent to a delivery. After such notice the keeper ceases to be the agent of the vendor and becomes the agent of the vendee, and thus the goods are placed under as effective control of the vendee, as they would be by an actual delivery." The buyer in such case takes all the rights of the pledgor, and may, because of his ownership of the property, recover the possession of it in the same manner that the pledgor could have recovered it had he remained the owner. He may tender payment of the amount due to the pledgee and demand the return to himself of the subject of the pledge, if this would not be a violation of the pledge contract, and, if the possession is refused, may sustain an action of replevin or trover. The rule is that the buyer may take upon himself all the obligations resting upon the pledgor, even to becoming personally liable for the performance of the contract.\* The assignee or purchaser should, however, give the pledgee notice that he has purchased the property and is the owner of it; this would be necessary for

\* *Dupre v. Fall*, 10 Cal. 430. "F. and H. made and delivered to S. a joint and several promissory note for \$4,500; afterwards, and before the maturity of this note, S. gave his note for \$1,000, with large interest, to C., and indorsed and delivered, as collateral security, the note of F. and H. for \$4,500. C. subsequently assigned S.'s note of \$1,000 to F. and delivered the note of F. and H. as collateral security, or as he held it. After this S. sold and assigned the note of F. and H. (\$4,500)

then in the possession of F., to D., the plaintiff; D. subsequently demanded of F. the \$4,500 note, offering to credit the same with the amount of the \$1,000 note and interest; F. declined to deliver the note, and D. brought suit to recover the amount of F. and H., less the \$1,000 note and interest. Held, that the suit was properly brought, and that D. is entitled to recover on the note against F. and H., less the amount of the \$1,000 note and interest."



his own protection, for without notice that the pledgor had assigned or sold the property, the pledgee might make payment, or even return the property to him and be protected from any action brought by the assignee; but with such notice to the pledgee of the assignment or sale of the property, it would be held subject to the ownership of the assignee or vendee; and if the pledged property should be sold on account of the default of the pledgor or his assignee to perform the pledged contract or obligation, the assignee or buyer of the property would be entitled to any surplus over and above the amount necessary to discharge the obligation for which the property was pledged.<sup>7</sup>

§ 278. **Pledgor's interest subject to judicial process.**—At common law the interest of the pledgor was not subject to process for claims against him, or to writ of execution.<sup>8</sup> The right of the pledgee to the possession of the property was respected. Statutes in many of the states have made changes in this respect and provided procedure by which the interest of the pledgor may be subjected to judicial process for the collection of judgments against him.<sup>9</sup>

In the case of *Pomeroy v. Smith*,<sup>10</sup> the plaintiff proved that the property in question had been pledged and delivered to him by the owner as collateral security for the payment of a debt, and to indemnify him against certain liabilities which he had incurred for the pledgor. After the goods were delivered they were seized upon a writ of attachment as the property of the pledgor. The contention upon the part of the defendant was that, if the plaintiff was entitled to a verdict, he should only be allowed to recover such a sum as would discharge the debt due to him from the pledgor, and be sufficient to indemnify him

<sup>7</sup> In *Van Blarcom v. Broadway Bank*, 37 N. Y. 540, the court say: "The accountability of the defendant was in no respect changed thereby, and the defendant had only a right to claim, as a charge against the proceeds arising upon the sale of the stocks, such amount as would have been necessary for the plaintiffs to have tendered on the day of the assignment, with interest and expenses,

to cancel, pay up and discharge the claim of the defendant, by the pledge of the stock, and not beyond that sum."

<sup>8</sup> *Wilkes et al. v. Ferris*, 5 Johns. 336.

<sup>9</sup> California, Georgia, Indiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Texas, Vermont and Wisconsin.

<sup>10</sup> 17 Pick. 85.

against the liabilities he had assumed. But the court below held that the plaintiff was entitled to recover damages to the full value of the goods that had been taken from him upon the writ, and judgment was had in accordance with his holding. Chief Justice Shaw, delivering the opinion of the court, held that the court below was right in directing that the value of the goods should be the rule of damages. In the course of the opinion the court said: "But neither by the common law nor by force of statute was this property lawfully attached. By the statute two modes of attaching property pledged or mortgaged are prescribed: one by the summoning of the pledgee as the trustee of the debtor; the other by first tendering the amount for which the goods stand subject."<sup>11</sup>

§ 279. When the debt secured is barred by statute of limitations.—The fact that the debt for the payment of which the property is pledged is barred by the statute of limitations will not release the property, and the pledgor cannot on this account compel the surrender to him of securities or property pledged without paying the indebtedness. The pledgee may not be able, because of the statute of limitations, to sue upon the

<sup>11</sup> In *Treadwell v. Davis*, 34 Cal. 601, the court say: "Whilst the interest of the pledgor may therefore be reached under an execution, it can only be done by serving a garnishment on the pledgee, and not by a seizure of the pledge. The law wisely provides that the pledgee shall not be disturbed in his possession unless it be by an order of the court made after examination, 'on such terms as may be just, having reference to any liens thereon or claims against the same.' In this method the rights of all parties may be protected; and it is the only method by which the interest of the pledgor can be subjected to an execution." *Reichenbach v. McKee*, 95 Pa. St. 432. "In the case of a pawn or a pledge there is a special property in the pawnee. It is liable to be sold on an exe-

cution against the pawnor, but subject to the rights and interests of the pawnee. The taking of the property out of the possession of the pawnee by a sheriff's sale does not divest his property and is in no sense a relinquishment of his lien, and a *bona fide* purchaser from a sheriff's vendee takes it subject to said lien. The sheriff sells only the title of the defendant in an execution, and the real owner, besides trespass against the sheriff, may maintain replevin or trover against his vendee." *Baugh v. Kirkpatrick*, 54 Pa. St. 84. "An execution cannot take goods out of a pawnee's possession without tendering him the money for which he holds them in pledge." *Briggs v. Walker*, 21 N. H. 72; *Mechanics' Bldg. & Loan Ass'n v. Conover*, 14 N. J. Eq. 219.

indebtedness and obtain a judgment; the statute may be a complete defense to such an action; but he can hold the pledged property for its payment, and, if default is made, may foreclose the pledge and sell the property for the payment of the indebtedness. The contract of pledge may be enforced and the property subjected to the payment of the debt to secure which it is pledged; even though the debt secured is outlawed the law will require a fulfillment of the pledge.<sup>12</sup>

§ 280. When will the statute of limitations run against the pledgor.—The statute of limitations will not begin to run against the pledgor until he has made a tender of the amount of the debt for which the property is pledged and the pledgee has refused to restore the property held by him as security for the indebtedness; until this is done no action could accrue in favor of the pledgor for the recovery of the property, and therefore the statute of limitations would not commence to run until the action was ripe. "Mere delay on the part of the pledgor to claim a redemption of the pledge for a period shorter than the time prescribed by the statute of limitations as a bar to an action on the debt for which the pledge was held would not suffice to raise a presumption against the right of the pledgor to redeem."<sup>13</sup> It is evident that the pledgor would not be barred

<sup>12</sup> In *Tembler v Palestine Ice Co.*, 17 Tex. App. 506, 43 S. W. 896, the court say: "A pledgee of stock may enforce payment of his debt by a sale of it, though the debt be barred by statute of limitation." In *re Oakley et al.*, 2 Edw. Ch. (N. Y.) 278; *Gage v. Riverside Trust Co.*, 86 Fed. 984. "A pledgor cannot compel the surrender to him of securities pledged without paying the indebtedness, on the ground that the statute of limitations has run against it; and further, he will be estopped from setting up the statute where in his complaint, in an action between the parties, he has admitted and alleged the indebtedness" *Conway et al. v. Caswell et al.*, 121 Ga. 254, 2 Am. & Eng. Ann. Cas. 269. In the notes

to 2 Am. & Eng. Ann. Cas., p. 271, are collected many cases, with comments on their several holdings, among them *Waterfield v. Rice*, 49 C. C. A. 504, 111 Fed. 625; *Hood v. Hammond*, 128 Ala. 569; *German, etc., Bank v. Hanna*, 124 Iowa, 379; *Bonbright v. Bonbright*, 123 Iowa, 305; *Wright v. Ross*, 36 Cal. 414; *Hancock v. Franklin Ins. Co.*, 14 Mass. 155; *Commercial Sav. Bank v. Homberger*, 140 Cal. 16.

<sup>13</sup> *Whelen's Ex'r v. Kingsley's Adm'r*, 26 Ohio St. 131. "Whatever the rule may be in cases where the pledgor makes no claim for redemption until after the right of the pledgee to recover his debt is barred by the statute of limitations, we are quite satisfied that mere delay

by the statute until the full term had run after his right of action had accrued.

Judge Story in his work on Bailments <sup>13a</sup> says: "If the pawnee does not choose to exercise his acknowledged right to sell, he still retains the property as a pledge, and upon a tender of the debt he may at any time be compelled to restore it; for prescription of the statute of limitations does not run against it." And he further adds: "After a long lapse of time, if no claim for a redemption is made, the right will be deemed to be extinguished and the property will be held to belong absolutely to the pawnee." It is, however, difficult to conceive of a case where the pledgor would by delay forfeit his right to redeem. That right is a vested property right, and is as absolute as is the equity of redemption in a mortgagor.

§ 281. The pledgor's right to redeem.—This is a right of which the pledgor cannot be deprived, even if the contract or agreement creating the pledge contains a covenant upon the part of the pledgor that the property shall become irredeemable upon failure to pay or perform the obligation for which the property is pledged. Public policy demands that the pledgor shall at all times prior to the sale of the pledged property upon foreclosure have a right to redeem it, and a contract of pledge containing an agreement or provision depriving the pledgor of the right to redeem is held to be void in that respect.<sup>14</sup> If after the pledge has been executed and the property delivered the

for a shorter period of time will not suffice to raise a presumption against his right to redeem. Until such bar against the debt is fixed it must be presumed that the credit and the pledge are continued by mutual consent."

<sup>13a</sup> Story on Bailments, sec. 346; *Cross v. Eureka Lake, etc. Canal Co.*, 73 Cal. 302. "A pledgee of shares of the capital stock of a corporation has a right to retain their possession until the debt to secure which they were pledged is satisfied; and while so holding he cannot claim them adversely and thereby acquire a title under the statute of limitations." *Han-*

*cock v. Franklin Ins. Co.*, 114 Mass. 155.

<sup>14</sup> In *Vickers v. Battershall et al.*, 32 N. Y. Supp. 314, the court held that "where a note was assigned as collateral security the debtor may redeem on payment of the debt though the assignment contained a provision that, in case the debt should not be paid at maturity, the note should belong to the assignee. An equity of redemption attached to the note in the plaintiff's hands, and nothing could destroy that equity except a judgment of foreclosure rendered by a court of competent jurisdiction. Forfeitures are abol-

parties should desire to cut off the right to redeem, that is, to fix a time or a condition upon which the title to the property should become vested in the pledgee, they may do so; and such a contract or agreement would not be considered void, for the reason that the pledgor would have a perfect right to make such a conditional sale of his equity of redemption. Unless, however, such a subsequent contract has been made disposing of his right to redeem, the pledgor may before the property is sold upon foreclosure of the pledge redeem by payment of the debt or performance of the obligation; and if in the contract pledging the property no particular time is fixed for redemption, he may redeem at any time; if the contract, however, fixes a time for redeeming by the pledgor, he could not redeem at any time before the expiration of the time fixed; but the right to redeem at any time after the time fixed, and before the foreclosure sale, would not be cut off by such a contract.

§ 282. **As to notice of intention to redeem.**—There are cases where the courts have held that the pledgee was entitled to a reasonable notice of the pledgor's intention to redeem in order that he might produce the bailed property and become assured that the indebtedness had been canceled, or that the pledgor had not waived his right to redeem. These courts seem to proceed upon the theory that it is no more than just in certain cases that the pledgee should have a reasonable time to deliver up the pledged property after the intention of the pledgor is made manifest. The supreme court of Georgia, in *McCalla v. Clark*,<sup>15</sup> entertains this theory, holding to the generally accepted doctrine that "tender of the debt on the day it becomes due terminates the creditor's right to retain possession of a pledge held

ished under our law, and the rule is firmly established that under every instrument given as security, the borrower has a right to redeem upon payment of the loan." *Clark v. Henry*, 2 Cow. 324. In *Peugh v. Davis*, 96 U. S. 332, the circuit court of the United States stated the rule to be that the right to redeem cannot be waived or abandoned by any stipulation of the parties made at any time, even if em-

bodied in the mortgage. *Lucketts v. Townsend*, 49 Am. Dec. 723; *Tredwell v. Clark*, 77 N. Y. S. 350.

<sup>15</sup> 55 Ga. 53; *Dewart v. Masser*, 40 Pa. St. 303. "A bailee who has received property to hold as security for the payment of a debt is under no obligation to return it until demand made, or at least until he has notice that the debt as security for which he holds the pledge has been discharged."

as collateral security; and it is an immediate conversion for him to refuse the tender and retain the pledge on a claim of title based upon an alleged forfeiture for delay to make payment;" and further holding that "if the debtor be himself in default by reason of having delayed payment beyond maturity of the debt, a like refusal and claim by the creditor will not amount to a conversion, if, on the same day of the tender, before suit is brought, and before the situation of the parties is materially changed, he retract his refusal, after taking the advice of counsel and then offer to accept the tender and restore the pledge, provided the tender be enlarged so as to cover charges on the pledge which the pledgee has lawfully paid prior to the tender." And in *Dewart v. Masser*<sup>16</sup> the court held that where the pledgee had become surety upon notes for the pledgor, and the pledgor had redeemed by paying the notes or discharging the indebtedness, that in such case the pledgee was entitled to notice of such payment or discharge of the notes and reasonable time to become assured of the fact of the payment. So it would seem that in these two classes of cases the pledgee would be entitled to reasonable notice, to wit, where a long time has expired after the paper becomes due for which the property was pledged, and the pledgor has been in default; and second, in cases where the pledgee has become surety and held the property to secure him, he would be entitled to notice that the note or the paper upon which he has become surety has been discharged and a reasonable time to determine for himself that fact.

§ 283. **The pledgor impliedly warrants the title of the pledged property.**—The rule that the pledgor impliedly warrants that he is the owner of the pledged property, or has such an interest or ownership as legally entitles him to pledge it as security for the payment of the debt or performance of the obligation, is analogous to the rule that obtains in the law of sales, which holds that the vendor impliedly warrants that he is the owner of the property sold; and following the analogy in this case, the bailor is liable in damages where the ownership or any part of it is not in him, and by reason of the defective title the pledgee is deprived of the property pledged.<sup>17</sup>

If the pledgor undertakes to pledge the property of another without his consent, he would be estopped from denying at any

<sup>16</sup> 40 Pa. St. 302.

<sup>17</sup> *Mairs v. Taylor* 40 Pa. St. 446.

time that he was not the owner of the property, and would not be allowed to invalidate the pledge or deprive the pledgee of the property; and although he was not the owner of the property at the time the pledge was consummated, but afterwards obtained the title, his ownership of the property would relate back to the time of the making of the pledge, and would inure to the benefit of the pledgee. In this the rule accords with that which obtains in sales and transfers of personal property, and in cases of conveyance of real property with covenants of seizin and warranty.<sup>18</sup>

§ 284. **Rights, duties and liabilities of the pledgee.**—We have already considered this subdivision in many of its features in our treatment of previous subjects, and little is left to be particularly noticed except to call attention to some certain phases not sufficiently explained. The general principles governing this class of bailments suggest the course of discussion. Possession, care, custody and return of the property is the natural course of the pledgee's contract if it is fulfilled and the indebtedness or obligation discharged. If the pledgor fails to pay or discharge the obligation, then a foreclosure of the pledge and all the rights, duties and obligations incident thereto; but this would belong more logically to another subdivision, namely, the rights and duties of the parties after the default of the pledgor.

§ 285. **The possession.**—As we have already seen, possession of the pledged property must necessarily be with the pledgee or his assignees; it is a requisite of the pledge, a symbol of the security guaranteed by the pledged property, and so the pledgee, as long as he remains the creditor or obligee of the pledgor, is entitled to the possession of the property pledged; it stands as his security for the indebtedness or obligation, guaranteeing payment or performance, and this possession becomes a vested property interest in the pledgee, which he owns as much as he owns his horse or any other chattel, nor can he be deprived of it any more easily. Until the debt or obligation is discharged the pledgee may hold and possess the pledged property, and cannot be deprived of it except by his own voluntary act, or by due process of law.<sup>19</sup>

<sup>18</sup> Goldstein v. Hort, 30 Cal. 372.

<sup>19</sup> Yeatman v. Savings Inst., 95 U. S. 764. "Until he shall be paid, the pledgee is entitled to the possession of the property which he

holds under a valid pledge as security for his debt against the pledgors, notwithstanding a subsequent adjudication of bankruptcy against them; and his re-

§ 286.—The pledge an incident of the debt secured, and assignable.—A pledge to secure the payment of a debt, or the performance of an obligation, is more than a mere bailment; it becomes a part of the transaction or contract to pay or perform the obligation; it is an incident to the debt itself and cannot be separated from it; therefore it is held that to make an effectual sale, both the pledge and the debt must pass to the assignee.<sup>20</sup> Possession, as has been said, is a requisite to a valid pledge, and to lose the possession might result in the loss of the security; for in such case the pledged property might become liable to levy and sale upon execution for the debts of the pledgor, or, if sold to a *bona fide* purchaser, become lost as security for the debt. While this is true, the security will be protected if the possession and indebtedness are held by the same person. So, the pledgee may assign the debt or obligation and with it the security, and the assignee would acquire all the rights and privileges of the pledgee; would be entitled to the possession of the pledged property, and be fully protected in that right even as against the pledgor or his assignor. In *Falkner v. Hill* <sup>21</sup> it was held that a pledgee might release a portion of the goods to the pledgor; or, with his consent, to his assignee, and not affect the lien of the pledgee upon the remainder of the property, or his right of action against the debtor upon the personal obligation.

fusal to surrender it to their assignees is not a conversion of it. The failure of the pledgee to appear and prove his claim in the bankruptcy court forfeits only his right to participate in the distribution of the bankrupt's estate ordered by that court."

<sup>20</sup> *Whitney v. Peay*, 24 Ark. 22; *Johnston v. Smith*, 11 Humph. (Tenn.) 396; *Bullard v. Billings*, 2 Vt. 309; *Chapman v. Brooks et al.*, 31 N. Y. 75. "A pledgee may assign the principal debt to a third person, and give him the benefit of any pledge which he holds to secure the payment of such debt. So long as nothing is done to deprive the pledgor of the right to redeem on payment

of the amount due on the principal debt the pledgor is not injured." *Jarvis v. Rogers*, 15 Mass. 389; *Whitaker v. Summer*, 20 Pick. (Mass.) 399; *Goss v. Emerson*, 23 N. H. 38; *Bailey v. Colby* 34 N. H. 29; *Belden v. Perkins*, 78 Ill. 449; *Bradley v. Parks*, 83 Ill. 169. As to negotiable instruments: *Duncomb v. N. Y. etc. R. Co.*, 84 N. Y. 190; *Lewis v. Mott*, 36 N. Y. 395; *White Mts. etc., R. Co. v. Bay State Iron Co.*, 50 N. H. 57; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604. It is not necessary to obtain the consent of the pledgor. *Curtis v. Leavitt*, 15 N. Y. 9.

<sup>21</sup> 104 Mass. 188.



§ 287. **Assignment of secured debt passes equitable interest in pledged property.**—The assignee of the debt secured by the pledged property stands somewhat in the same relation as the assignee of the mortgage indebtedness to the mortgage security; he has an equitable interest in the pledge and the pledged property, which under certain circumstances may be enforced. The pledgee's interest in the property exists only because of the indebtedness; the debt and the special property in the security cannot be separated. When the pledgee ceases to own the debt the special property and all the property he has in the pledge ceases, and he has no legal or equitable interest in it. If, with the assignment of the debt, the pledgee passes the pledged property to his assignee, then the assignee has a legal interest in it, and his relations to it are the same as that of the pledgee; but if the pledgee does not deliver to him the possession of the pledged property, the assignee has an equitable interest in it and may enforce it, unless it be negotiable paper which has been transferred to a *bona fide* holder, or such a transfer is not contemplated by the contract of pledge. The supreme court of Connecticut, in *Homer v. Savings Bank*, after fully discussing the question, and the American and English cases bearing upon it, say: "The principle to be extracted from these cases is this: That when collateral security is given or property assigned for the better protection or payment of a debt, it shall be made effectual for that purpose, and that not only to the immediate party to the security, but to others who are entitled to the debt; and to make them thus effectual a court of chancery will lend its aid, and the reason is that such is the intent of the transaction." <sup>22</sup>

The courts holding to this doctrine proceed upon the theory that the pledgee holds the property pledged simply and alone as security for the payment of the debt, and that it is the intention of the original parties that the property should be subjected to the payment of the debt if the pledgor should fail to discharge the obligation. That while the legal title to the property remains in the pledgor, it is a naked title; the equitable and beneficial interest being to the extent of the security for the debt in the pledgee. So it has been held that upon assignment of the debt the security being created for the payment of the

debt is a trust existing for that specific purpose which equity will enforce.<sup>23</sup>

§ 288. **Rights of assignee subject to the contract of pledge.** The original contract of pledge cannot be superseded by any subsequent action on the part of the pledgee without the consent of the pledgor. If it was clearly the intention of the parties that the pledged property should remain in the hands of the pledgee and should not be assigned to another, that contract would be respected and enforced, and in such case the pledged property would be held by the pledgee. Such intention may be gathered from the language of the contract, or may be implied. Ordinarily there is no such implication in law, but it has been suggested that such an implication would arise from the nature of the thing pledged, as in the case of a valuable work of art which it is to be supposed the pledgor would not desire to give over into the care of strangers.<sup>24</sup> It may, however, be further observed that if the contract of pledge does not provide that the pledged property shall be turned back to the pledgor in case of the assignment of the debt, or in some other way clearly show that it is the intention of the parties, in case of such an assignment, to release the property from the lien of the pledge, that it could be held in the hands of the pledgee still subject to the pledge, and in case of default be subjected to the discharge of the secured debt.

§ 289. **May repledge.**—As we have seen, the pledgee has a property in the pledge to the extent of his security; it therefore follows that to the extent of this property interest he may repledge it to secure his own obligation, but he cannot pledge

<sup>23</sup> *Stearns v. Bates* 46 Conn. 306; *Estey & Green v. Graham*, 46 N. H. 169; *Jones on Pledges*, sec. 419. In *Van Eman v. Stanchfield*, 13 Minn. 75, it was held that the pledgee cannot separate his special property in the pledge from the debt secured by it so that the debt shall be owned by one person and the pledge by another. It was therefore held that the assignee of the pledge could not maintain an action or enforce a lien unless he could show that

he also owned the debt secured by the pledge. In *Ponce v. McElvey*, 47 Cal. 154, it was held that the assignee of the principal debt and collateral security holds the latter upon the same terms that the original pledgee held it. *Alexander, etc. R. Co. v. Burke*, 22 Grat. (Va.) 254.

<sup>24</sup> The suggestion of the text is borne out in the opinion by Cockburn, J., in *Donald v. Suckling*, L. R. 1 Q. B. 585.

beyond the interest which he has. This repledging of the property, however, must always be subject to all the restrictions of the original pledge, and to disregard these restrictions and the original pledged contract, or to repledge the property claiming to be the owner thereof, would be a fraud upon the original pledgor as well as upon his pledgee, and might be held to be a conversion.<sup>25</sup>

**§ 290. Right to use the pledged property.**—The general rule is that the pledgee has no right to use the pledged property except by permission of the pledgor, or by the agreement which creates the pledge.<sup>26</sup> Exceptions to this general rule, however, are numerous, principally growing out of the obligation of the pledgee to exercise reasonable care and prudence in caring for the property; for there are many kinds of property the subject of the pledge that ordinary care would require to be used. Examples of this kind have already been given, both where property is corporeal and incorporeal.<sup>27</sup> The use, however, must be a proper use, and consistent with the ordinary care required, having in contemplation the object of the pledge and the property pledged. As, for example, a carriage horse would require exercise in order to give him proper care, and the pledgee would

<sup>25</sup> In *Jarvis v. Rogers*, 15 Mass. 389, the court say: "From these cases it appears that the pawnee may deliver the goods to a stranger without consideration, or he may sell and assign all his interest absolutely, or assign it conditionally by way of pawn, without in either case destroying the original lien, or giving the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment." In *Story on Bailments*, sec. 327, it is said: "But whatever doubt may be indulged in as to the case of a mere factor, it has been decided that in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

This doctrine is affirmed in *Belden v. Perkins*, 78 Ill. 449.

<sup>26</sup> *Sterns v. Marsh*, 4 Den. 227; *McArthur v. Howett*, 72 Ill. 358; *Story on Bailments*, secs. 99-329. Where property is pledged the pledgee may, with the assent of the pledgor, use it in any way consistent with the general ownership and the ultimate rights of the pledgor. *Lawrence v. Maxwell*, 53 N. Y. 19. But should any damage arise by reason of such use the pledgee would be answerable. As touching the liability of the assignee of the pledgee of stock, see *Maxwell v. National Bank*, 70 S. C. 532, 3 Am. & Eng. Ann. Cas. 723, and notes.

<sup>27</sup> *Thompson v. Patrick*, 4 Watts (Pa.), 414; *Story on Bailments*, sec. 329; *Lawrence v. Maxwell*, 53 N. Y. 19.

be entirely excusable for driving the animal to a carriage for this purpose; but to put him into a plow team would be an illegal use of the pledged property for which the pledgee might be subjected to damage. And where coupon bonds are pledged it is the duty of the pledgee to cut the coupon at the proper time and collect the interest or dividends and account for the proceeds; if a mortgage or note, to collect the interest or the principal when due; if stocks, to protect them, and even, if necessary to their protection, to vote them at the meeting of the stockholders. But ordinarily the pledgee could not vote the stock as the owner of it, and if he does so vote without any legal consent for so doing, the act might be deemed to be an act of conversion of the pledge and the pledgor could restrain the pledgee from so doing.<sup>28</sup>

§ 291. **Expenses and profits.**—The right of the pledgee to make expenditures and to collect profits upon the pledged property is based upon the rule governing the rights and liabilities of the bailee, and is occasioned by reason of the bailment being a mutual benefit bailment requiring ordinary diligence, which is that degree of care that an ordinarily prudent man would usually bestow upon property of a like nature under just such circumstances. Unusual expenses or improvements would not be allowed, but it is incumbent upon the bailee to do whatever is necessary in order to keep the property in such a condition that it will be reasonably available for the purposes of the pledge, being at all times limited to expenses which are usual and necessary. The pledgee, while bound to make useful and necessary repairs, however, cannot make new, expensive and unusual improvements, or such as materially change the bailed property or the use of it. If he does no more than to incur usual and ordinary expenses, however, he can recover his outlay to the extent of the increased value.<sup>29</sup> In *Fagan v. Thomp-*

<sup>28</sup>*McDaniels v. Flour Mfg. Co.*, 22 Vt. 274; *Schouler's Bailments and Carriers*, sec. 216. "The pledgee of the stock has apparently no right to vote upon it as owner; and at all events he ought not, where, under the mode of acquiring transfer, he has escaped the liability of a stockholder; but the fact that the pledgee so votes does not amount to conversion of

the pledge." *Heath v. Silverthorn Co.*, 39 Wis. 147. The pledgee of stock certificates has the right to collect the dividends. *Maxwell v. National Bank*, 70 S. C. 532, 3 Am. & Eng. Ann. Cas. 723, and notes, page 725, where a number of cases are collected.

<sup>29</sup>*Hendricks v. Robinson*, 2 Johns. Ch. 283.

son<sup>80</sup> the pledgee of a steamer, who had advanced large sums of money from time to time to aid in running it, and who assumed and paid debts and expenses that had accumulated for repairs and insurance, was allowed by the court an additional lien upon the property for such advancements and expenses. So the pledgee of an insurance policy, who was compelled to pay premiums upon it by way of keeping the policy alive, was allowed to recover the amount paid in addition to the indebtedness for which it was pledged.<sup>81</sup> In *Hill v. Smith*<sup>82</sup> it was held "that a trustee who is a pledgee of personal chattels is entitled to a fair compensation for all reasonable expenses attending the keeping of them, and has a lien therefor upon the property pledged as against the pledgor and the plaintiff. Such trustee, upon the sale of the chattels pledged to him by a receiver under the direction of the court, is entitled, both as against the principal defendant and the plaintiff, to so much of the avails of such sale as will satisfy not only the original debt for which the chattels were pledged, but also the reasonable expenses incurred in the keeping of the same." The rule as to the amount of expenses that may be incurred by the pledgee and recovered for seems to be that the expenses must be reasonable and such as would be incurred along the line of the pledgee's duty, and if they go beyond that it cannot be recovered; and his duty may be said to be to keep and preserve the property, protect the title and make the security available. So he would be warranted in paying assessments upon stock that are legally made and premiums upon insurance policies that must necessarily be paid in order to keep the policy in force. The same degree of diligence would make it incumbent upon the pledgee to col-

<sup>80</sup> 38 Fed. 467.

<sup>81</sup> *Rowan v. State Bank*, 45 Vt. 160.

<sup>82</sup> 28 N. H. 369; *Starratt v. Barber*, 20 Me. 457. "Where property is put in the hands of the payee of the note by the principal promisor as collateral security therefor, it is received by him under an implied obligation to account for the proceeds; and whatever expenses are necessarily incurred by him in asserting his

title, or in rendering it available, are a fair charge upon the property, and the balance only is to be applied to the payment of what is due." *Ray v. Ross*, 59 Ga. 62, where a pledgor was allowed to recover for premiums paid by him upon an insurance policy to keep it alive. *Bank of Staten Island v. Silvie*, 85 N. Y. S. 760, 89 App. Div. 465; *Mansur, etc. Co. v. Carey*, 1 Ind. T. 572, 45 S. W. 120.

lect, care for and account for all profits and increase arising from the pledged property; and should he fail to exercise ordinary diligence in this regard, to the damage of the pledgor, he would be liable for whatever damages resulted from want of such care; for the pledgee is not only called upon to exercise ordinary diligence, but he is liable to the pledgor for ordinary negligence.

If profits accrue in the hands of the pledgee, he is entitled to hold them, and, if of such a nature that they can be so applied, to apply the same toward the payment of the debt; or in case the debt or obligation is discharged, to restore such profits and all increase, together with the pledged property, to the pledgor.<sup>33</sup> It may also be said that it is the duty of the pledgee to make the pledged property profitable if he can do so; and where expenses accrue in that respect he would be entitled to deduct them from whatever profits were realized, being under obligation at all times to account to the pledgor for whatever transactions he may have had in connection with the pledged property. It may be said that the rule resolves itself into this: The pledgor is entitled to all the profits of the bailment and is liable for all the necessary expenses while in the hands of the bailee. If the property consists of stocks or valuable securities paying dividends and profits, the pledgee must account for them; if of personal property yielding profits or increase, as a herd of milch cows, a flock of sheep, or such like property, the pledgee must account for the same to the pledgor, but will be entitled to all expenses necessarily incurred in caring for the pledge, and in some cases a fair compensation as pledgee for special services, if the property requires it, by way of care and custody.

§ 292. **Liability for loss and damage.**—The pledgee is required to exercise ordinary diligence and is liable for ordinary

<sup>33</sup> In *Hunsaker v. Sturgis* 29 Cal. 142, it was held: "Where the relation of pledgor and pledgee exists, if the debt is paid, it is the duty of the pledgee to account for and pay over all the income, profits and advantages derived from the bailment." In *Merrifield v. Baker*, 9 Allen, 29, it was held that the mortgagor could maintain an action against the mort-

gagee to recover money subsequently received by him for return premiums at the expiration of the policies, and that it was immaterial that the policies had become void by the alienation of the insured property without the consent of the company." *Androscoggin R. Co. v. Auburn Bank*, 48 Me. 335; *Hager v. Union Nat. Bank*, 63 Me. 509.

negligence, so any loss that is the result of the ordinary negligence of the bailee while the property is in his custody and under his control would render him liable to the bailor or owner. "If perishable goods are pledged, the pledgee is bound to use ordinary care to preserve them; but if they perish naturally, the loss would fall on the pledgor."<sup>34</sup> If the property is lost by theft, the mere fact that it has been stolen establishes no liability; but if it should appear that because of the negligence of the bailee the property was so lost, the bailee would then be held liable.<sup>35</sup> The burden of proof in such cases is upon the pledgor, as it is he that alleges the negligence, and it is also incumbent upon him to show the damage occasioned by reason of such negligence.<sup>36</sup>

§ 293. **Payment of debt releases pledged property.**—The payment of the debt or the performance of the obligation for which the property is pledged releases the property from the lien of the pledge, and the pledgor is entitled to the possession of it at once. The pledgee cannot retain the pledged property as security for the payment of other debts than that for which it was pledged unless there be an agreement with the parties that it shall be so held.<sup>37</sup> The debt need not necessarily be paid in money; payment may be made as well by delivery and acceptance of personal property; anything that effects a satisfaction of the debt is a payment.<sup>38</sup> The whole debt, including principal and interest, however, must be paid in order to discharge the lien, and until the whole debt is paid the pledgee is entitled to retain the property. A mere renewal of the note which evidences the indebtedness is not a payment of the debt and unless it is stipulated to have that effect it will not discharge the lien of the pledge.<sup>39</sup> It goes without saying that the pledgor is entitled to credit for all the profits that have accrued

<sup>34</sup> *Thompson v. Dill*, 30 Ala. 444; *Willets v. Hatch*, 132 N. Y. 41, 17 L. R. A. 193, and notes.

<sup>35</sup> *Story on Bailments*, sec. 338; *Jenkins v. National Bank*, 58 Me. 570; *Winthrop Sav. Bank v. Jackson*, 67 Me. 570; *Petty v. Overall*, 42 Ala. 145.

<sup>36</sup> *Murphey v. Partsch* (Idaho), 23 Pac. 82.

<sup>37</sup> *Biebinger v. Continental*

*Bank*, 99 U. S. 143; *Armstrong v. McLean*, 153 N. Y. 490.

<sup>38</sup> *Strong v. Worden*, 6 Vt. 563.

<sup>39</sup> *Moses v. Trice*, 21 Gratt. (Va.) 556; *Kinney v. Kempton*, 46 Vt. 80; *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208. In *Thorn v. Bank*, 37 Ohio St. 254, it was held: Where part of a promissory note is paid, and a note in renewal is executed for

to the pledgee by reason of the pledge by way of increase or money received on account of the use of the property, and it is the duty of the pledgee to render a just and true account of the same and apply it upon the indebtedness of the pledgor.<sup>40</sup>

§ 294. **A tender of the amount due will discharge the lien of the pledge.**—A tender of the amount due for principal and interest, together with any expenses which the pledgee is legally entitled to, will discharge the lien of the pledge.<sup>41</sup> It is necessary, however, that the full amount should be tendered to the pledgee, and in making this tender the usual and ordinary rules applicable to tender apply; that is to say, it would not be necessary for the pledgee to actually produce the amount of money if the circumstances were such as to preclude the necessity of such a production of the money; as, for example, if the pledgee stated that there would be no use of producing the money because he would not accept it; nor would it be necessary to tender currency that is legal tender if there was no objection upon the part of the pledgee to the money actually produced and tendered for the reason that it was not such currency. And it has been held that where a tender is made to a pledgee who makes no objection to the amount, but does not surrender the pledge or accept the tender, the lien is extinguished, and his possession becomes a wrongful conversion, even though the tender is in fact less than the amount due the pledgee. The tender must be unconditional except the condition that the property which has been pledged should be returned to him. The tender should at all times be kept good, that is to say, in such a way that it can at any time be produced and brought into court.<sup>42</sup>

A tender legally made of the amount is equivalent, so far as effecting a discharge of the property is concerned, to a payment of the debt, and it re-invests the title to the thing pledged in the pledgor and he can maintain trover or replevin for it.<sup>43</sup> But it

the balance, a pledge given as collateral security when the first note was executed will stand as collateral security for the balance of the debt embraced in the new note, in the absence of any agreement to the contrary.

<sup>40</sup> *Sokup v. Lettillier*, 123 Mich. 640, 82 N. W. 523.

<sup>41</sup> It was held in *Tomboy Gold*

*Mine Co. v. Green*, 11 Colo. App. 447, "that an unconditional tender of the amount for which stock is pledged terminated the lien of the pledgee and also the right to retain it."

<sup>42</sup> *Brooklyn Bank v. De Grauw*, 23 Wend. 342.

<sup>43</sup> *Coggs v. Bernard*, 2 Ld. Raymond, 909; *Ball v. Stanley*, 5 Yerg.



must be remembered in this connection that the pledge of the property is only a security for the payment of the debt, and in no way affects the debt itself, and while a tender of the amount due the pledgee, if rejected, will release the property held as security from the lien or pledge it will in no way discharge the obligation to pay the debt.<sup>44</sup>

(Tenn.) 199. Tender of the amount of the debt when due releases the property pledged from the lien of the pledge. *Stewart v. Brown*, 48 Mich. 383; *Van Hansen v. Kanouse*, 13 Mich. 302; *Moynahan v. Moore*, 9 Mich. 9; *Cass v. Higenbotom*, 100 N. Y. 248; *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14; *Latta v. Tutton*, 122 Cal. 270; *Furgeson v. Popp*, 42 Mich. 115. If the refusal to accept the tender is not absolute or unreasonable it does not discharge lien. *Waldron v. Murphy*, 40 Mich. 668. While a tender of amount due may discharge

the lien, it will not discharge the debt; and the pledgee, notwithstanding the tender, may have an action for the debt. The tender does not relieve the pledgor from his personal liability. *Potts v. Plaisted*, 30 Mich. 149; *Kortright v. Cady*, 21 N. Y. 348, 78 Am. Dec. 145; *Mitchell v. McRoberts*, 17 Fed. 776. But a mere offer to pay is not a tender. *Bakman v. Povler*, 15 Wend. 637; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604; *Talty v. Fireman, etc. Co.*, 93 U. S. 321, L. ed. 886.

<sup>44</sup> *Post*, § 298 notes.

## CHAPTER V.

### THE RIGHTS AND LIABILITIES OF THE PLEDGOR AND PLEDGEE OF CORPOREAL PROPERTY AFTER DEFAULT.

§ 295. The subject and its discussion.

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**§ 295. The subject and its discussion.**—The pledging of the property is to secure the payment of the debt or performance of the obligation when due. The guarantee is not only that the amount due upon the debt will be paid or that the obligation will be performed, but it is that the amount will be paid and that the obligation will be performed at the time it is due. It therefore follows that failure to pay the debt or perform the obligation at that time renders the pledgor in default and gives to the pledgee the right to look to the pledge to secure the debt or obligation.

The rights and obligations of the pledgor and pledgee after such default will be the subject of discussion in this chapter, and in considering these we have subdivided the subject as follows:

- (1) The rights and liabilities of the pledgor and pledgee of corporeal property after default.
- (2) The rights and liabilities of the pledgee of negotiable instruments after default.
- (3) The rights and liabilities of the pledgee of stocks and bonds of corporations after default.
- (4) The rights and liabilities of the pledgor after default.

#### SECTION I.

#### THE RIGHTS AND LIABILITIES OF THE PLEDGOR AND PLEDGEE OF CORPOREAL PROPERTY AFTER DEFAULT.

**§ 296. The pledgee's remedies.**—The property pledged stands simply as security for the payment of the debt or performance of the obligation. The realization of the debt is the all-important matter, and the holding of the security in no way confines or limits the realizing of the amount secured to proceedings against the pledged property; the pledgee may at his option foreclose the pledge and sell the property, or he may sue on the debt, obtain judgment, and collect the same or any part of it by levy and the sale of other property of the debtor.<sup>1</sup>

<sup>1</sup> *Elder v. Rouse*, 15 Wend. 218. "Where in a mortgage of property a party acknowledges his indebtedness to another in a sum certain, and declares that for the purpose of securing the payment thereof he transfers the property specified in the instrument, the

creditor, on default of payment, may bring his action, and is not bound in the first instance to resort for satisfaction to the property." In *Beckwith v. Sibley*, 11 Pick. (Mass.) 482, it was held "that *prima facie* a right of action accrued to the consignee imme-

§ 297. **The pledge security not lost by suit and judgment on the debt.**—The property is pledged as security for the payment of the debt, and the only thing that will discharge the pledged property from the lien of the pledge is payment or discharge of the obligation; as the obtaining of a personal judgment can in no way be said to be a payment or discharge of the indebtedness it cannot affect the pledge. The pledgee may therefore have a judgment against the pledgor and at the same time hold the pledge as security for the debt, unless there is some contract or agreement limiting or changing this legal right.

In *Wallace v. Finnagan*<sup>2</sup> the supreme court of Michigan say: "A person holding collateral security is not bound, unless he chooses; to resort to it before suing upon his principal claim. When that claim is satisfied he may be compelled to release or re-assign the collaterals, but his right to sue the claim itself is an absolute one and not in any way affected by his possession of the securities, and he cannot, therefore, be compelled to surrender them as a condition of enforcing his legal demand." So a pledgee is not bound to surrender the pledged property before he can proceed to sue and obtain judgment upon the personal obligation.<sup>3</sup> Judgment may be obtained, execution or at-

diately upon his making the advances to the consignor, notwithstanding he had a lien upon the notes as security for the debt due him." *Whitaker v. Sumner*, 20 Pick. 117. "A creditor holding collateral security may nevertheless bring an action upon his demand and attach property of the debtor to satisfy the judgment." *Whitwell v. Brigham*, 19 Pick. 399. "In the absence of a statute, or stipulation to the contrary, the possession of the pledged property does not suspend the right of the pledgee to proceed personally against the pledgor for his debt without selling the goods." *Sonoma Valley Bank v. Hill*, 59 Cal. 107.

<sup>2</sup> 14 Mich. 170. "In the absence of special equities a pledgee of personal property will not be re-

quired to exhaust his security before enforcing his personal remedy upon the debt." *Grand Island Sav. & Loan Ass'n v. Moore*, 40 Neb. 686; *De Cordova v. Barnum*, 9 N. Y. Sup. 237. "Where collaterals are deposited with a broker to secure the result of a sale and purchase of stock, he holds the collaterals as a pledge, and is not bound, in the absence of an agreement, to sell or return them before bringing suit to recover the loss resulting from the transaction." *Germania Savings Bank v. Peuser*, 40 La. 796; *Barnes v. Bradley*, 56 Ark. 105; *Pate v. Hoffman*, 16 N. Y. Sup. 74.

<sup>3</sup> "It is no defense to a suit on a note that collateral security given has not been returned or accounted for." *Ambler v. Ames*, 1 App. D. C. 191.

tachment against other property may be levied, and it has been held that even committing the debtor's body to prison on an execution for debt, where such a proceeding is permitted, would in no wise lessen or impair the right of the pledgor to hold the pledged property as security. The pledgee may, after obtaining the judgment, levy upon and sell other property, and if the amount realized upon such sale is not sufficient to discharge the debt, he may afterward sell the pledged property which he holds as security upon foreclosure of the pledge for the balance; or he may foreclose his pledge and bring an action and recover a judgment for any deficiency after sale of the pledged property, and proceed to collect his judgment for deficiency by execution and sale of other property.<sup>4</sup>

§ 298. Discharge of lien by tender is not discharge of debt. A tender of the amount of the indebtedness which is refused by the pledgee may operate as a discharge of the lien of the pledge and entitles the pledgor to release and return of the pledged property. Such a tender and release, however, will not discharge the debt or obligation, and the pledgee may, after the lien of the pledge has thus been released, and after having been deprived of the property which he held as security, bring an action to recover the debt and obtain judgment and have execution for the same, and levy upon and sell the property of the pledgor to satisfy the demand.<sup>5</sup>

<sup>4</sup>Smith v. Strout, 63 Me. 205; Sonoma Valley Bank v. Hill, 59 Cal. 107; Whitewill v. Brigham, 19 Pick. 117; Morse v. Woods, 5 N. H. 299. Where, however, after the suit is commenced the pledgee sold the pledged property held as security, and realized upon the sale a greater amount than the amount of the debt upon which suit was brought, it was held that such a sale would abate the suit; that it was equivalent to a payment *pendente lite*. Lewis v. Jewett, 51 Vt. 378.

<sup>5</sup> While a tender may release the lien of the pledge it will not operate as a discharge of the debt, and notwithstanding the tender the

pledgee may have an action for the amount of his debt. Potts v. Plaisted, 30 Mich. 149; Kortright v. Cady, 21 N. Y. 328, 17 Am. Dec. 145; Norton v. Baxter, 41 Minn. 146, 4 L. R. A. 305, and note 306. "In one respect a tender is not equivalent to payment; for although the lien is discharged by either, the debt is not discharged by a tender, but the pledgee may still maintain an action for this. Jones on Pledges, sec. 542. At common law a tender of the debt on the law day satisfies the condition of the mortgage and discharges the property from the incumbrances as effectually as payment, but the debt remains and

§ 299. The pledgee may attach pledged property or levy his execution upon it, but waives the lien of the pledge.—It is also well settled that the pledgee, or his assignee, may sue the pledgor on his personal obligation and levy an execution in the suit upon the pledged property. He may commence his suit by attaching the property pledged, or may attach the property during the pendency of the suit; but it seems to be generally held that if the plaintiff, pledgee or assignee, attaches the pledged property which he holds as security, or levies upon it an execution sued out in his action against the pledgor, he waives the lien of pledge; he cannot hold the property by virtue of the pledge and at the same time hold it by attachment or execution levy. By the levy of the writs or either of them he asserts that the property is the property of the pledgor, and that possession may be taken to satisfy the judgment, and it would seem that by this act the pledgee would be estopped from asserting a right in himself to hold possession of the property. The claim of possession by the pledgee by reason of the pledge would be antagonistic to the claim of the officer by virtue of the levy of the writ which the pledgee has directed.\* The supreme court of Kansas, in *Jones v. Scott*<sup>7</sup> held that where property exempt from execution has been pledged, the exemption is waived, and the property may be sold by virtue of an execution issued on the judgment recovered on the debt secured.

It would seem that the reasoning of the court might be questioned in this case. If the levying of an execution waives the lien, the moment the lien is waived the property right that had been conveyed to the pledgee becomes re-invested in the pledgor,

may be recovered by action at law. A tender of the debt after its maturity extinguishes the lien on personal property pledged to secure its payment; a pledgor may recover the pledge or its value in any proper form of action without keeping the tender good, or bringing the money into court, and the pledgee may have his action for the debt. A debt payable in money is never discharged by a tender; it is only where a debt is payable in spe-

cific articles of personal property that a tender operates as a satisfaction of the demand. *Mitchell v. Roberts*, 17 Fed. 776; *Moynahan v. Moore*, 9 Mich. 9; *Shields v. Lozier*, 35 N. J. Law, 496; *Story v. Krewson*, 55 Ind. 397; *Perre v. Castro*, 14 Cal. 519; *Hemmelmann v. Fitzpatrick*, 50 Cal. 650.

\* *Legg v. Willard*, 17 Pick. 140; *Buck et al. v. Ingersoll*, 11 Met. 226.

<sup>7</sup> 10 Kan. 33.

and he holds it as he holds any other property that is exempt from execution. No agreement or contract waiving exemption from execution can be said to have been contemplated at the time of entering into the contract of pledge. The pledgor reserved the right to redeem the property, the right to have it sold, if sold at all, by virtue of the power in the pledge, or regularly foreclosed as provided by law, which is an entirely different procedure than that by execution, levy and sale. To hold that exempt property which has been pledged is subject to levy and sale upon an execution by reason of its having been pledged for the same debt would be permission to vary the contract by which the pledge is created without the consent of the party pledgor. The policy of the law is to exempt certain property from execution. It is a statutory privilege, and a contract of waiver of that privilege would necessarily be subject to a strict construction.<sup>8</sup>

**§ 300. Defense of the pledgor to action of pledgee upon the debt secured.**—The right of action upon the debt secured by the pledged property is entirely independent of and distinct from the contract of pledge, and so the pledge is in no way affected by an action for the debt; nor can the pledgor offset the pledged property to the claim of the pledgee in such action;<sup>9</sup> nor could he recoup damages claimed because of a depreciation of the property while in the possession of the pledgee, though such depreciation occurred after the debt was due and at a time when the pledged property could have been sold for the debt. This is true even though the pledgor at such time requested the pledgee to sell the property.<sup>10</sup>

Conversion of the property by the pledgee would no doubt raise a question of right on the part of the pledgor by way of defense to an action upon the debt. In many of the states stat-

<sup>8</sup> Jones on Pledges, sec. 599.

<sup>9</sup> Bank v. Jackson, 67 Me. 570.

<sup>10</sup> Rozet v. McClennan, 48 Ill. 345. "Where a party deposits the stock of an incorporated company as collateral security to a promissory note, with power of sale to the pledgee in case of default of payment after a demand and notice, he may sell the stock and apply the proceeds to the dis-

charge of the note; but the pledgee is not bound to sell, and on failure to do so he is not liable for the loss sustained by depreciation in the value of the stock which may occur after the default. The pledgor should have redeemed by sale of the stock, or otherwise the general property remains in him with the right of redemption."

utes have been passed allowing the pledgor the right of set-off in such cases; but if there was no statutory right, it would seem that, if the amount received by the pledgee by reason of such conversion was fixed and liquidated, it would be allowed by way of set-off; and if the pledging of the property was connected with and a part of the transaction of contracting the debt, then in such case recoupment would be proper and allowable by way of defense to the action upon the debt in case of conversion of the property by the pledgee.<sup>11</sup>

**§ 301. The foreclosure of the pledge of corporeal property.** The title to the property pledged remains in the pledgor subject to the right of possession and the lien of the pledgee. Failure to pay the debt when due does not divest the pledgor of the title or give to the pledgee any greater title than he before had. The pledgee may, however, when default has been made in the payment of the debt for which the property was pledged, proceed to foreclose his pledge, but until he has foreclosed the pledge he cannot deprive the pledgor of his title. By this foreclosure proceeding he has recourse to the property, and through it, and by reason of it, may subject it to the payment

<sup>11</sup> *Stern v. Marsh*, 4 Denio, 227; *Bank v. Marshall*, 11 Fed. 19; *Bigelow v. Walker*, 24 Vt. 149. In *Winthrop Bank v. Jackson*, 67 Me. 570, the question arose as to whether or not in a suit upon the debt the pledgor could set off the bond which was the property pledged to secure the payment of the debt. The court say: "Whatever may be the contract, express or implied, on the part of the bank growing out of the pledge of this bond under the facts agreed, there can be no liability on the part of the bank to return the bond until the note has been paid; its lien must continue so long as the note remains in its possession unpaid. There is no pretense of payment, and the tender made was a conditional one and therefore of no effect. The defendant could not under exist-

ing facts maintain an action for the bond; the demand filed founded upon the same claim cannot be allowed." Citing *Houghton v. Houghton*, 37 Mich. 72, and *Robinson v. Stafford*, 57 Me. 163. Continuing, the court say: "Nor does the law of recoupment apply. To make that available it must appear that there is some stipulation in the contract sued which the plaintiff has violated." A defense by way of recoupment denies the validity of the plaintiff's cause of action to as large an amount as the plaintiffs allege he is entitled. *Waterman on Recoupments*, secs. 465, 466; *Harrington v. Stranton*, 22 Pick. 510. This can only be when the liability of both parties arises out of the same transaction, or from mutual and independent covenants of agreement.



of the debt for which it was pledged; the pledgor, however, at all times and until the pledge is actually foreclosed, has a right to redeem the property from the lien of the pledge, and this equity of redemption, as it is called, is a right and privilege belonging to the pledgor, of which he cannot be divested even by a contract or agreement made at the time of the pledge; but, as has been shown, by a subsequent contract for a valuable consideration he might dispose of his equity of redemption.<sup>12</sup>

Foreclosure of the pledge is generally effected in one of three ways:

(1) By sale under the power contained in the contract of pledge.

(2) By statutory proceedings.

(3) By bill in chancery and obtaining a decree of the court for the sale of the property.

§ 302. (1) **By sale under the power contained in the contract of pledge.**—If the pledged contract be in writing, it usually contains an authorization to the pledgee, in default of payment of the debt or the performance of the obligation at the time and in the manner provided for payment and performance, to sell the pledged property either at public or private sale. This authorization to sell the property is called the power of sale in the contract. This power to sell, however, at *public sale*, even though it is not contained in the written contract, or in case there is no written contract, but a mere pledge of the property for the payment of the debt or the performance of the obligation, is implied from the pledging of the property. The procedure is sometimes called “a sale at common law,” or “a common-law foreclosure,” and the right to sell extends as well to the assignee of the pledgee’s interest as to the pledgee.<sup>13</sup> There are, however, exceptions to the general rule, as in case of

<sup>12</sup> Coningham’s Appeal, 57 Pa. St. 474; Mitchell v. Roberts, 17 Fed. 776.

<sup>13</sup> Alexander v. Burke, 22 Grat. (Va.) 254; Jerome v. McCarter, 94 U. S. 734-739. The court say with reference to the sale of the pledged property: They passed by delivery, and even were there no express stipulation in the con-

tract of pledge that the pledgee might sell on default of the pledgor, such a right is presumable from the nature of the transaction. 2 Story’s Eq., sec. 1008. In ordinary cases no special agreement is necessary to confer upon the pledgee power to sell the property pledged. The power is ordinarily incident to the pledge.

pledge of commercial paper as security for a loan of money. In the absence of a special power for that purpose the pledgee is not authorized, upon non-payment of the debt and upon notice to the pledgor, to sell the securities pledged either at public or private sale, but he is bound to hold and collect the same as they become due and apply the money to the payment of the loan. This because the proper mode of making such a security available would be by collecting the money and not by selling the security.<sup>14</sup>

§ 303. The sale, unless otherwise allowed by contract, must be public.—“At common law a pledgee cannot sell without judicial process, unless reasonable notice be given to the pledgor to redeem, and the pledgor is entitled to such reasonable notice not only of the pledgee’s intention to sell, but also of the time and place of the sale, and the sale should be at public auction.” In *McDowell v. Chicago Steel Works et al.*,<sup>15</sup> the court say: “At common law, when property is pledged to secure a debt, the right to sell for default in payment is conferred by the law, and hence the sale must be made subject to the conditions imposed by the law—that is to say, after making demand and giving notice; but where the pledge is accompanied by a special contract as to sale upon non-payment of the debt, the right to sell

<sup>14</sup> *Wheeler v. Newbould*, 16 N. Y. 392. In *Sleeven v. Morrow*, 4 Ind. 425; *Roberts v. Thompson*, 14 Ohio St. 7, and *Jennison v. Parker*, 7 Mich. 335, it was held “that the pledgee is bound to use reasonable diligence in the collection of negotiable paper pledged as collateral security.”

<sup>15</sup> 124 Ill. 491; *Sell v. Ward*, 81 Ill. App. 675; *National Bank of Ill. v. Baker*, 128 Ill. 533; *Story on Bailments*, sec. 310. “The sale should be at public auction.” *Wheeler v. Newbould*, 16 N. Y. 395; *Dykens v. Allen*, 7 Hill, 497. “A sale at the broker’s board is not a public sale.” *Brass v. Worth*, 40 Barb. 648; *Jones on Pledges*, sec. 603. “It is well settled rule of the common law that a pledgee upon default may sell

at public auction the chattel pledged, without judicial process and decree of foreclosure, upon giving to the debtor reasonable notice to redeem, although the old rule existing in the time of *Glanville* required a judicial sentence to warrant a sale unless there was a special agreement to the contrary. This right to sell upon default is implied in the contract of pledge and does not depend upon any express stipulation.” *Jerome v. McCarter*, 94 U. S. 734; *McDowell v. Chicago Steel Co.*, 124 Ill. 491; *Merchants’ Bank v. Thompson*, 133 Mass. 482; *Hancock v. Franklin Ins. Co.*, 114 Mass. 156; *Ogden v. Lathrop*, 65 N. Y. 158; *Canfield v. Minn. etc. Ass’n Co.*, 14 Fed. 801, 15 Fed. 260. See notes 4 L. R. A. 586.

is conferred not by the law, but by the contract itself, and hence must be exercised in the mode specified by the parties in their agreement. As such contract embodies the intention of the parties, its silence as to notice justifies the inference that the power to sell without notice was intended to be conferred."

§ 304. **The notice of sale.**—The pledgor, the owner of the property pledged for the payment of the debt or the performance of the obligation, is specially interested in having the pledged property bring the best price possible at the sale, and that it be not sacrificed, for the reason that he is liable for any deficiency and is entitled to any surplus that may arise by the sale of the property; the presumption is that by a public sale more bidders will be attracted and a better price will be realized. The pledgor is entitled to be personally notified of the time and place of the sale, unless the contract provides that a sale may be had without such notice; and if by the contract it is stipulated that to fix the pledgor's liability a demand must be made, then both demand and notice of sale must be given to the pledgor.<sup>16</sup> The time of the sale of the property, unless fixed by the contract, is uncertain, depending entirely upon the will of the pledgee, and so the only way in which the pledgor can know the time and place is by notice from the pledgee, who fixes both. The pledgor has the right to redeem at any time before the property is sold upon foreclosure, and it is therefore very important that he should be notified of the time and place when and where that very important privilege is to be cut off; and so it is said that the pledgee is bound to give the pledgor notice of the time and place of the sale, whether the debt is payable on a fixed day, or whether payable immediately or at some future time;<sup>17</sup> and if the pledgor cannot be found, and

<sup>16</sup> "At common law, when property is pledged to secure a debt, the right to sell for default in payment is conferred by the law, and hence the sale must be made subject to the conditions imposed by the law; that is to say, after making demand and giving notice." *McDowell v. Chicago Steel Works et al.*, 124 Ill. 491.

<sup>17</sup> *Jeanes' Appeal*, 116 Pa. St. 573. The court say (p. 582): "In

the view that we take of the present case there is but one question which requires consideration, and that is whether the pledgee of the stock had the lawful right to sell it at private sale and without notice to the pledgor. In an ordinary case of pledge, of course there is no such right. The pledgee must first give notice to redeem, and if the pledge is not redeemed and he proposes to sell

for this reason he cannot be notified, then it will be necessary for the pledgee to resort to judicial proceedings in order to foreclose the pledge.<sup>18</sup> Formal notice of the time and place of sale would not be necessary if the pledgor has actual notice.<sup>19</sup> The only object in giving notice being that he may be informed as to when and where the sale is to take place, to require the pledgee to give actual notice when the pledgor already has full knowledge upon that subject would be to require a vain thing.

it, he must sell it at public sale and after notice to the pledgor. If this is not done the pledgor's rights are unaffected by the sale." In *Stearns v. Marsh*, 4 Denio, 227, the court say: "It is said that the law makes a distinction between the case of a pledge for a debt payable immediately, and one where the debt does not become payable until a future day; and that in the latter case the creditor is not bound to call for a redemption or to give notice of sale, though in the former it is conceded that there must be such demand and that notice must be given. Non-payment of the debt at the stipulated time did not work a forfeiture of the pledge, either by the civil or at the common law. It simply clothed the pledgee with authority to sell the pledge and reimburse himself for his debt, interest and expenses; and the residue of the proceeds of the sale then belonged to the pledgor. The old rule existing in the time of Glanville required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary. But as the law now is, the pledgee may file a bill in chancery for a foreclosure and proceed to a judicial sale; or he may sell without judicial process upon giving reasonable notice to the pledgor to redeem and of the intended

sale. I find no authority countenancing the distinction contended for; but on the contrary, I understand the doctrine to be well settled, that whether the debt be due presently or upon time, the rights of the parties to the pledge are such as have been stated. (Citing cases.) Nor do I see any reason for such a distinction. In either case the right to redeem exists until a sale; the pledgor is equally interested to see to it that the pledge is sold for a fair price. The time when the sale may take place is as uncertain in the one case as in the other; both depend upon the will of the pledgee, after the lapse of the term of credit in the one case, and after a reasonable time in the other, unless indeed the pledgor resorts to a court of equity to quicken a sale. Personal notice to a pledgor to redeem, and of the intended sale, must be given as well in the one case as in the other, in order to authorize a sale by the act of the party. And if the pledgor cannot be found and notice cannot be given to him, judicial proceedings to authorize a sale must be resorted to."

<sup>18</sup> *Garlick v. James*, 12 Johns. (N. Y.) 146; *Ind. & I. C. Ry. Co. v. McKennan*, 24 Ind. 62.

<sup>19</sup> *Loud v. Burke*, 22 Grat. (Va.) 264; *Jones on Pledges*, sec. 613.

§ 305. The pledgee cannot be purchaser at the sale.—The relation of the pledgee and the pledgor may be said to be fiduciary. The pledgee in a sense holding the property in trust for the pledgor, in the exercise of good faith is bound to obtain upon the sale all that the property is reasonably worth, and in carrying on the foreclosure sale is bound to exercise that good faith which is always required where like relations exist. It may therefore be said to be a general rule that the pledgee cannot be a purchaser at his own sale.<sup>20</sup> It has been held, however, that where a pledgee makes a sale under and within the terms of the pledge, and purchases the pledged property himself, such purchase is not *per se* void, but only voidable at the instance of the pledgor or one in privity with him.<sup>21</sup> A purchase, however, by the pledgee at his own foreclosure sale is governed very largely by the fairness and good faith of the transaction, and if coupled with acquiescence on the part of the pledgor, or a waiver of the irregularity, the title to the property would pass. It is, however, at all times subject to the option of the pledgor; and if he should refuse to ratify the sale or to waive the irregularity within a reasonable time, the sale would be avoided and the pledge would be in the same condition as though there had never been a sale upon foreclosure; that is to say, a sale under such circumstances is not void, but voidable at the option of the pledgor, who may elect to treat such a sale as valid or avoid it.<sup>22</sup>

<sup>20</sup> *Glidden v. Mechanics*, etc. Bank, 53 Ohio St. 588, 43 L. R. A. 737. And see note 43 L. R. A. 737, where the subject of sale of corporeal and incorporeal property is discussed and authorities collected and cited.

<sup>21</sup> *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759, reversing the decree in 43 Fed. 223.

<sup>22</sup> In *Bryan v. Baldwin*, 52 N. Y. 235, the court say: "The plaintiff being pledgee of the stock, and in that character exposing it for sale, could not become the purchaser unless the defendant assented to such purchase. Story

on Bailments, sec. 319; *Torry v. Bank of Orleans*, 7 Paige, 649; *Hawley v. Cramer*, 4 Cow. 736. This sale to the plaintiff was not void, but voidable at the election of the defendant. *Edwards on Bailments*, 260, 261. The defendant was at liberty to ratify the sale, and had he done so it would have been valid for all purposes. The ratification would have made it lawful and relieved it from any imputation of being tortious as to him. The title of the plaintiff to the stock would have been thereby made perfect, and the defendant entitled to credit upon the note for the net proceeds of

§ 306. **The utmost good faith demanded in the matter of the notice of sale.**—The pledgee must exercise the utmost good faith at every step in the foreclosure of his pledge, and especially is this demanded in the matter of the notice of sale in fixing the time and place. Reasonable time must be given so that the pledgor may, if he can, redeem his property from the pledge, and, if he cannot redeem it, procure purchasers to attend the sale, that there may be plenty of bidders and thus the property bring a fair price. A proper place must be designated, for by fixing the sale at an unsuitable place the property might not be sold at anything like a fair price. As, for example, it could not be said to be fair or just to a pledgor of railroad stocks, that are generally bought and sold at money centers, to advertise their sale at some country cross-roads where the attendance would be very small, and the bidders few if any, while if

the sale. But the defendant has not done this, but has elected to treat the purchase by the plaintiff as illegal. This avoids the sale, and that being avoided by the defendant, the parties are remitted to their rights the same as though no sale had been attempted; the defendant is liable upon the note, and the plaintiff still holds the stock as pledgee." *First Nat. Bank v. Rush*, 85 Fed. 539; *Ross v. Barker* (Neb.), 78 N. W. 730. "It has often been decided that where notes, bonds or shares of stock have been placed as collateral securities in default of payment of the principal debt, they may with due procedure be sold, and if purchased by the pledgee the sale is voidable at the election of the pledgor, and he may redeem the securities or treat the sale as valid and have the amount of the bid or purchase price credited on the debt." *Fidelity Ins., Trust & Safe Co. v. Roanoke Iron Co.*, 81 Fed. 439; *Glidden v. Bank*, 53 Ohio St. 588;

*Steelman v. Weiskittle*, 88 Md. 519. "A sale by the pledgee of the article held in pledge which is merely colorable, and which is subsequently rescinded by the pledgee, who takes back such articles into his possession, is wholly inoperative to divest the pledgor's title, and by reporting such a pretended sale to the pledgor, thereby leading him to believe that his rights in the pledge are gone, the pledgee disentitles himself to make a subsequent sale of the pledge without giving the pledgor notice of the facts and of his intention to make such sale." *Leahy v. Lobdell, Farrell & Co.*, 80 Fed. 665. Held in Massachusetts, under statute authorizing pledgee on notice to pledgor to sell the pledge at public auction, that the pledgee is precluded from buying in the property at the sale, since his duty to the pledgor to get the highest price is inconsistent with his interest as a purchaser. *Lord v. Hartford*, 175 Mass. 320.

the pledged property consisted of farming utensils it might be a very proper place for holding the sale. All the circumstances surrounding the particular case must be considered; the residence of the parties, and the place where it would be convenient and reasonably expected that the sale would take place. The time and place must be suitable in view of all the facts. "Where railroad bonds were pledged in Texas and sold in New York it was held a good sale, as New York is the financial center of the country."<sup>23</sup>

§ 307. **Pledgor cannot compel pledgee to sell within a specified time.**—The pledgor at all times before the property is sold on foreclosure has the privilege of redeeming the property by discharging the debt or obligation for which it stands pledged, and for this reason it is said he cannot, in the absence of a contract or agreement, make it the duty of the pledgee to sell the pledged property within a specified time by request or by directing him to do so. The supreme court of Minnesota in discussing this question say: "There might be such a contract between the pledgor and pledgee as would make it the absolute duty of the latter to sell within a specified time, in which case his liability by reason of failure to sell within the time would not depend on negligence. But in the absence of some such contract there is no liability of the pledgee to the pledgor except for negligence. The exercise of ordinary care in respect to the thing pledged is the duty which the law imposes on a pledgee, and for a breach of that duty only, does he become liable. After the contract of pledging is made, neither party can, by anything he alone may do, vary the duties or powers attaching to the relation. Some cases hold that a request to sell may be an element in the proof of negligence, but we express no opinion on the point, nor do we express any whether, in the absence

<sup>23</sup> *King v. Texas B. & Ins. Co.*, 58 Tex. 669. In *Hagan v. National Bank*, 182 Mo. 319, 81 S. W. 171, the court set aside sale of corporate stock. In *Perkins v. Applegate*, 27 Ky. L. 522, 85 S. W. 723, the court set aside the sale, holding that the pledgee, on becoming the buyer, must show that the sale was fairly made, and that he

acted in good faith to protect the pledgor. But where the terms of the pledge conferred the power to purchase to the pledgee, at the foreclosure sale, the Massachusetts court held such purchase valid and refused to set aside the sale. *Jennings v. Wyzanski*, 188 Mass. 285, 74 N. E. 347.

of express contract, it is the duty of the pledgee at any time to sell a chattal pledged." <sup>24</sup>

The question has sometimes arisen whether, in case of a falling market, the pledgor could not by request or demand compel the pledgee to sell the property, and if he failed to do so, whether in such case the pledgee would not be liable for any depreciation in value where the sale was made at a time when the property had materially depreciated, and the price for which it was sold was very much less than could have been obtained for it at the time the request was made by the pledgor. It seems, however, to be well settled that the pledgee is not compelled to sell the pledge even when requested so to do by the pledgor, for the reason that the pledgor always has a remedy; for if he wishes to save himself from depreciation in the value of the pledge, he can redeem the property. This is always his right; and so it follows that he cannot charge the creditor with such depreciation without having first tendered to him the amount of the debt.<sup>25</sup> But if the refusal to sell upon request is simply by reason of bad faith, or a faulty discretion equal to negligence, in such case it would seem that there might be a liability to which the bailee would be compelled to answer. This is referred to by the court in *Wells et al. v. Wells*,<sup>26</sup> where they say: "It is well understood that in order to charge the pledgee of such a collateral as this with the collateral as a payment *pro tanto* upon his debt, he must be chargeable with bad faith or faulty discretion in the course taken in respect to the collateral, so that it would be detrimental and unjust toward the pledgor not so to charge the pledgee." This is no doubt the rule in case the property pledged is negotiable instruments. In such case it is the duty of the pledgee not only so to deal with them as not to destroy their value, but to use ordinary diligence in making them available for the payment of the debt, and if he suffers indorsed paper to mature without resorting to the neces-

<sup>24</sup> *Cooper v. Simpson*, 41 Minn. 46, 4 L. R. A. 194.

<sup>25</sup> *Jones on Pledges*, sec. 606; *Taggard v. Curtenius*, 15 Wend. 155; *Rozet v. McClennan*, 48 Ill. 345.

<sup>26</sup> 53 Vt. 1; *Hanna v. Holton*, 78 Pa. St. 334. "When the collateral is lost by the insolvency of the

debtor in it, through the supine negligence of the creditor, he must account for the loss to his debtor." *Baker v. Briggs*, 8 Pick. 129; *Paine v. Packard*, 13 Johns. 174; 5 *Wait's Actions and Defenses*, 234; *Cooper v. Simpson*, 41 Minn. 46.



sary steps to charge the indorser, or fails to pursue reasonably the primary parties, he may be held responsible for any loss that may ensue.<sup>27</sup> To what extent, however, this rule applies where the pledged property is chattels and not in the nature of negotiable paper, is not so well settled; but it would seem that where the pledge is such property, the obligation to sell could not be fixed upon the pledgee upon notice and demand unless it could be shown that the refusal was an exercise of bad faith, and that the pledgor would be obliged to rely upon his right to redeem in order to protect himself because of the depreciation.

**§ 308. Surplus in the hands of the pledgee, proceeds of the sale.**—The only right, title or property of the pledgee in the property pledged is co-extensive with the securing of the payment of the debt or the performance of the obligation. The legal title to the property is in the pledgor, subject only to this right of security in the hands of the pledgee. It therefore follows that whenever the purpose of the pledge, that is to say, the securing of the payment of the debt, is satisfied, the pledgor's right to the remainder is absolute. The pledgee being simply a trustee for this amount is bound to account to the pledgor for whatever he obtains upon the sale of the pledged property, and after deducting the amount due upon the indebtedness and the expenses of the sale or other legal expenses, he must pay over to the pledgor any surplus that may remain in his hands; and if he fails or refuses so to do, the pledgor may collect the surplus due him in an action of *assumpsit*.<sup>28</sup>

**§ 309. (2) — Foreclosure by statutory proceedings.**—In nearly all of the states the foreclosure of the pledge or pawn has been regulated by statute. In some of the states, however, the statute is so worded that it does not preclude a common-law foreclosure. A citation of the several statutes and a discussion thereof would be impracticable here. However, it may be remarked that the statutes of the particular state where foreclosure is to be had should be examined.<sup>29</sup>

<sup>27</sup> *Easton v. German American Bank*, 24 Fed. 523; affirmed, 127 U. S. 532. "If the pledgee sells the pledge fairly and publicly he is not answerable for the loss from its selling for less than its estimated value." *Ainsworth v. Bowen*, 9 Wis. 348.

<sup>28</sup> *Jones on Pledges*, secs. 649, 650; *Foster v. Berg*, 104 Pa. St. 324; *Miles v. Walther*, 3 Mo. App. 96; *Loomis v. Stave*, 72 Ill. 623; *Taylor v. Turner*, 87 Ill. 296.

<sup>29</sup> In Massachusetts and California the statute does not affect a common-law foreclosure. Col-

§ 310. (3) **Foreclosure in equity.**—When the business is complicated and the amount of the indebtedness is large, and a large amount of pledged property is held to secure its payment, or where the pledgor cannot be personally notified because of absence or for some other reason, or where the legal remedy is not adequate, and this even though the statute provides the only mode of foreclosing the pledge, or where the rights and remedies of the pledgee are questioned or denied, the pledgee may and should file a bill in equity, and through the court of chancery obtain a decree of foreclosure and for the sale of the pledged property. And so it may be said that where there are conflicting claims to the pledged property, and proceedings in the ordinary way by common-law foreclosure would not settle the conflicting claims, or where there are intervening rights, no matter how they may arise,—in such case the ordinary statutory foreclosure or the common-law foreclosure would be by no means adequate, and the pledgee should proceed by foreclosure in equity, and thus by a decree of that court settle all the controversies between the parties.<sup>30</sup> It has been said that some question might arise as to the jurisdiction of the equity court where, by statute, the foreclosure is limited to those cases where the remedy by sale or notice is not complete. But it has been held that where the foreclosure in such cases involve an accounting, the equity jurisdiction will be upheld,<sup>31</sup> but if it is merely a computation it will be denied.<sup>32</sup>

§ 311. **The notice and sale by virtue of decree.**—The manner of giving the notice of sale, the notice as to time and place, the sale, and the entire procedure, where the foreclosure is had in a court of equity, is fixed and settled by the practice and procedure of the chancery court; all such directions are generally given in the decree of foreclosure.

§ 312. **When the pledgor is insolvent or bankrupt.**—The right of the pledgee to hold and possess the pledged property, when the pledge is without fraud and honestly created to secure the debt or obligation, is an absolute property right of the pledgee and he cannot be deprived of it by the pledgor or the

ville v. Loud, 135 Mass. 41, and  
Mange v. Heringhi, 26 Cal. 527;  
Jones on Pledges, sec. 616.

<sup>30</sup> Horner v. Savings Bank, 7  
Conn. 478.

<sup>31</sup> Durant v. Einstine, 5 Robt.  
(N. Y.) 423.

<sup>32</sup> Dupay v. Gibson, 30 Ill. 197.

pledgor's creditors. It therefore follows that the assignee in bankruptcy cannot convert this interest of the pledgee in the pledged property as an asset of the pledgor. He can only take the interest of the pledgor in the property, which, as we have seen, is the title to the property subject to the pledge; and it has been held that if an assignee realizes on pledged property in the possession of the pledgor for temporary purposes, he holds the proceeds in trust for the pledgee.<sup>33</sup> In *Gibson v. Warden* <sup>34</sup> the court say: "In cases like this the assignee stands in the place of the bankrupt; his rights are their rights; and theirs, like the liens of judgments at law, are subordinate to all the prior liens, legal and equitable, upon the property in question." If the pledge is fraudulent, then the assignee, standing in the place of and for the pledgor, and also for the creditors of the pledgor, may proceed to have the pledge set aside, and the pledgor by collusion with the pledgee could not thwart the rights of the assignee in this regard. The assignee can do just what the honest pledgor ought to do; nor can he be defeated by any fraudulent agreement of the pledgor or pledgee. "So while the pledgor could not have the pledge set aside as fraudulent, the assignee might."<sup>35</sup>

The authorities are not entirely harmonious as to the proceedings that the pledgee may take in proving his claim and obtaining a settlement of the pledge and securing satisfaction for the pledged indebtedness. It seems clear, however, that the pledgee may sell the pledged property upon default and apply the proceeds of the sale after the pledgor's insolvency. The assignee having taken possession of the rights, interests and property of the pledgor, undoubtedly should receive notice of the sale as well as the pledgor, because legally he stands in the place of the pledgor and is representing a property interest in the pledge; but the assignee, it would seem, could not deprive the pledgee of his right to foreclose, nor could he obstruct the sale for the reason that the property will not at the time bring a good price. He would be subject to the same rules and principles, already discussed, that govern the pledgor in such like

<sup>33</sup> In re Wiley, 4 Biss. (U. S.) 171; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136.

<sup>34</sup> 14 Wall. (U. S.) 248; Ken-

dall & Co. v. Mason, 7 Ohio St. 199.

<sup>35</sup> Bank of Alexandria v. Herbert, 8 Cranch (U. S.), 36; Casey v. Caveroc, 96 U. S. 467.

cases, and the only remedy of the assignee, or of the creditors in such case, would be to redeem the property by paying the debt.<sup>26</sup> Should the pledged property bring more than the amount due the pledgee, then the pledgee must account to the pledgor's assignee for the surplus; and should the property bring less than the amount due the pledgee, he has a claim for the deficiency against the estate, and in that case must take *pro rata* with other creditors.<sup>27</sup>

## SECTION II.

§ 313. **Rights, remedies and liabilities of the pledgor and pledgee of negotiable instruments after default.**—The same rights and remedies that the law accords to the pledgee of corporeal property after default do not in every particular obtain in case the pledged property consists of negotiable instruments or choses in action. The difference in the rights of the pledgee in case the pledged property is corporeal or consists of negotiable instruments grows out of the difference in the nature and kind of property pledged. Corporeal property is presumed always to have a market value which represents the true value of the property, while negotiable instruments are not presumed to have a value upon the market before they are due, so the selling of them at public or private sale necessarily would work an injustice to the pledgor. The rule, however, is different where the pledged property consists of stocks and bonds of corporations. These may be sold at public auction after demand of payment and due notice of sale, the same as corporeal property, because that is the usual method of turning such securities into money. But the rule when the property consists of negotiable instruments, like promissory notes or choses in action, differs from this, for the reason that it is not the "usual method" of turning such securities into money. A sale, however, at public auction of the securities in case of default may be stipulated by an agreement between the parties, and in such case be legally made, but where there is no such agreement the rule is as we

<sup>26</sup> Jerome v. McCarter, 94 U. S. 734.

<sup>27</sup> Findley v. Hosmer, 2 Conn. 350; Walker v. Baxter, 26 Vt. 710; Borough's Estate, 75 Pa. St. 460; Van Matter v. Ely, 12 N. J. Eq.

211; West v. Bank of Rutland, 19 Vt. 403; Midgeley v. Slocum, 32 How. Pr. (N. Y.) 423; Steeper v. McKee, 86 Pa. St. 188; Richardson v. Wyman, 4 Gray, 553.

have stated. In *Wheeler v. Newbould*<sup>32</sup> it was held "that the pledge of commercial paper as security for a loan of money does not, in the absence of a special power for that purpose, authorize the pledgee upon the non-payment of the debt, and upon notice to the pledgor, to sell the securities pledged either at public or private sale, but he is bound to hold and collect the same as they become due, and apply the money to the payment of the loan." The court say further: "When the subject of the pledge consists of goods and merchandise, or chattels of any kind, there is no other way in which they can be applied to the payment of the debt, unless they are first converted into money, which can only be done by a sale. The creditor must resort to this process because there is no other. Goods and merchandise, and personal chattels generally, are constantly bought and sold in the market, and the means to test their proximate value is always at hand. Their value at the place where they are offered is their value everywhere else; because it depends upon their intrinsic worth, and not upon extraneous circumstances. When the creditor, therefore, offers this kind of property for sale to satisfy his debt, he does the debtor no injustice if the sale is public, properly conducted and upon due notice. But where choses in action for the payment of money, notes, bills, bonds and mortgages are the subject of the pledge, the case is widely different. This species of property has no intrinsic value of which one person may judge as well as another. They are the written evidences of debts due or to become due from others, and their value depends exclusively upon the solvency and ability of the debtor to pay them at maturity. They are not merchandise in the usual sense of the word; and although they are sometimes the subject of sale, the practice is of recent origin, and evidence of the abuses rather than the legitimate uses of credit. A creditor holding such property in trust for the use of his debtor, and offering it for sale in satisfaction of his debt, can hardly fail to sacrifice it; for unless the solvency and circumstances of the makers of the note are well known and placed beyond doubt, few will purchase, and those only for the purpose of speculation and at ruinously low prices. Unless the stipulations of the contract are expressly to that effect, the law will not require the debtor to submit his property to an ordeal

<sup>32</sup> 16 N. Y. 392.

which must be, in a great measure, destructive of its value. It will rather presume that it was the intention of the parties to the contract that the creditor should, if he resorted to the pledge in place of the personal liability of the debtor, accept the money upon the hypothecated securities as it became due and payable, and apply it to the satisfaction of his debt. This is the fair import of the contract; for it is not reasonable to infer an intention to subject to the hazards of a sale a species of property which is not usually the subject of a sale, more especially when that property furnishes itself a means of reimbursing the creditor without loss, or the hazard of loss, to the debtor. The acceptance of the pledge does not suspend the creditor's remedy against the debtor a moment after the debt falls due. But if he resorts to the hypothecated securities, consisting of the written obligations of others for the payment of money, he must accept the money upon them as they become due, in place of selling and perhaps sacrificing them at a sale. This is just and right both to debtor and creditor, and the law seeks to accomplish nothing less."

In *Joliet Iron Co. v. Sciota, etc., Co.*<sup>39</sup> the court say: "The pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for

<sup>39</sup> 82 Ill. 549; *Union Trust Co. v. Rigdon*, 93 Ill. 458. "The law is well settled, where there is no agreement otherwise, the pledgee in possession takes only a lien on the property as a security, and is bound to keep the pledge and not use it to its detriment, and to redeliver it on payment of the debt. His character is that of a trustee for the pledgor to return the property if redeemed, and, if not redeemed, then first to pay the debt, and second to pay over the surplus, and he cannot so deal with the trust property as to destroy or even impair its value." *Fletcher v. Dickinson*, 7 Allen, 23; *Nelson v. Edwards*, 40 Barb. 279; *Nelson v. Wellington*, 5 Bosw. 178; *Jenness v. Bean*, 10 N. H. 266; *Austin v. Curtis*, 31 Vt. 72;

*Farwell v. National Bank*, 90 N. Y. 483. "The pledging of promissory notes embraces power to collect." In *Hanna v. Holton*, 78 Pa. St. 334: "By an assignment of collateral security a privity in contract is established which invests the assignee with the ownership of the collateral for the purpose of dominion over the debt assigned. He alone is empowered to receive the money to be paid upon it and to control it in order to protect his rights." The invalidity of sale of commercial paper at public sale is discussed in *Moses' Ex'r v. Grainger*, 106 Tenn. 7, 53 L. R. A. 857. In the note to this case in 53 L. R. A. 857, a full discussion is had and cases cited. See, also, *ante*, § 276. See notes 4 L. R. A. 587.

that purpose, authorize the parties to whom such paper is so pledged to sell the securities so pledged upon default of payment either at public or private sale. He is bound to hold and collect the same as it becomes due and apply the net proceeds to the payment of the debt so secured." And where a sale has been authorized upon default of the pledgor by the agreement of the parties, the courts have construed such an agreement with very great strictness, holding that the power conferred is in derogation of common-law duties and takes the place of wise and equitable safeguards which are interposed for the protection of the pledgor, and relieves the pledgee from such duties imposed upon him, and that these safeguards and duties are intended to prevent fraud and a breach of trust imposed. The authorities, however, are not entirely harmonious upon this subject. In some of the states it has been held that negotiable paper may be sold the same as corporeal property.<sup>40</sup> In other respects the rights and remedies of the pledgee are similar to those where the property pledged is corporeal. The pledgee may bring an action upon the debt secured, or may resort to the pledged property; and if he brings an action upon the debt, he need not, during the pendency of the action, surrender the security, but may hold the property pledged.<sup>41</sup> Nor will the judgment, if one is obtained, destroy the right of the pledgee to hold possession of the pledged property. Nothing will deprive him of his right to possession except payment of the debt.

§ 314. **The English rule.**—The English courts generally follow the rule that the sale of negotiable instruments and choses in action, after failure to pay the pledged debt may be made by making demand and giving notice of the time and place of the sale, the same as though the property were corporeal property.<sup>42</sup>

§ 315. **Recourse to the pledged security.**—The pledgee, where the property pledged is negotiable instruments or choses in action, may have recourse to the pledged property in case of de-

<sup>40</sup> *Donohoe v. Gamble*, 38 Cal. 340; *Huyler v. Dahoney*, 48 Tex. 234. For compilation and discussion of authorities, see *National Bank of Ill. v. Baker*, 4 L. R. A. 586, and notes; also *Golden v. Mechanics' Nat. Bank*, 43 L. R. A. 737, and the note.

<sup>41</sup> *Elder v. Rouse*, 15 Wend. 218; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *Whitwell v. Brigham*, 19 Pick. 117.

<sup>42</sup> *France v. Clark*, L. R. 22 Ch. Div. 830; 52 L. J. Ch. (N. S.) 263; 48 L. T. (N. S.) 185; *Potter v. Thompson*, 10 R. I. 1.

fault of the pledgor; but his procedure, as we have seen, must necessarily differ from the procedure as stated where the property is corporeal. It is his duty to hold the negotiable paper or chose in action until the same is due and then collect it and apply it upon the pledged indebtedness. He may collect the negotiable paper either with or without suit, as the case requires. After collecting sufficient upon the pledged securities to satisfy the indebtedness and the cost of collection, it is his duty to account to the pledgor for any surplus, either in money or securities, remaining in his hands after the pledged indebtedness is thus satisfied. The pledgee thus holding negotiable instruments as securities stands in the position of a trustee of the property; he is bound to exercise ordinary care in looking after the pledge. It is not only his right but it is his duty to collect the amount due upon the securities.

The supreme court of Illinois, in the case of *Joliet Iron Co. v. Sciota Brick Co.*<sup>43</sup> say: "A person holding property or security in pledge occupies the relation of trustee for the owner, and as such, in the absence of special power to do otherwise, is bound to proceed as a prudent owner would." This sums up the duty of the pledgee holding the pledged negotiable instruments. If he fails to exercise that diligence and care which a prudent owner under just such circumstances would exercise, he becomes liable for any injury that may result because of such negligence to the pledgor or his assigns.

**§ 316. The pledgee's diligence in collecting the securities.—** The pledgee is a bailee of the securities for the benefit of both parties. He must therefore exercise ordinary diligence in performing every duty incumbent upon him. What would the ordinarily prudent owner of just such negotiable instruments do under just such circumstances? The answer to this question defines the duties of such a pledgee and fixes as well his liability. The court in *Hazard v. Wells*<sup>44</sup> say: "A creditor holding

<sup>43</sup> 82 Ill. 584, 25 Am. Rep. 341.

<sup>44</sup> 2 Abb. N. Cas. (N. Y.) 440. "Where the pledgee knows that the maker of a pledged note is in embarrassed circumstances he must use greater diligence than if the maker were known to be solvent." *Slevin v. Morrow*, 4

Ind. 425. "The parties may bind themselves, however, by an agreement as to the diligence to be used." *Lee v. Baldwin*, 10 Ga. 208; *Muirhead v. Kilpatrick*, 21 Pa. St. 237; *Girard F. & M. Ins. Co. v. Muir*, 46 Pa. St. 504; *Miller v. Gettysburg Bank*, 8 Watts (Pa.),



negotiable paper as collateral security is required to use a different kind of diligence from that required of one holding merchandise or other corporeal property, and yet the diligence in each case is only such as is appropriate to the nature of the property. If the property be precious stones, safe keeping is all that is required. If it be grain, it must be properly stored and protected from all injury. The diligence required of the holder of promissory notes, or other securities for the payment of money, has reference to the danger that the parties liable on them may become insolvent and unable to pay. A prudent business man will collect such obligations when they are due, or will endeavor to enforce them by suit. If, therefore, a creditor neglects to enforce the collection of such securities held in pledge, and delays till the parties liable have become insolvent, he is as much guilty of negligence as if he had suffered grain held in pledge to be destroyed by dampness or heat for lack of proper storage." The degree of diligence, however, that is required to be exercised by the pledgee may be modified by an agreement between the parties. As, for example, it has been held that where the parties make an express agreement as to the diligence to be used, they will be bound by that and not by the general law.<sup>45</sup> But, whatever the agreement may be, or whatever the condition of the case, the law requires that the pledgee shall act in the utmost good faith. This is a rule that obtains throughout the law of bailment, and applies to this class of cases.

**§ 317. Pledgee may recover in an action on the negotiable securities.**—Negotiable paper having been pledged and placed in the hands of the pledgee, the pledgee may recover, in an action upon the security, a judgment against the maker and indorsers of the paper when the same becomes due, and he need not wait until the pledgee's indebtedness is due, but may collect by a suit at law or otherwise upon the collaterals and hold and apply the amount collected on the pledge. In such action he will be entitled to a judgment for the full amount of the collateral even though it exceeds the amount of the debt secured. If, however, there are equities in favor of the maker against the pledgor, the pledgee could not recover an amount more than sufficient to meet the pledged indebtedness, the theory of

192; *Reeves v. Plough*, 41 Ind. 209;  
*Jones v. Hicks*, 52 Miss. 682. See  
editorial notes, 68 L. R. A. 482.

<sup>45</sup> *Lee v. Baldwin*, 10 Ga. 208;  
*Bar v. Cain*, 32 Ind. 416.

the law being that the maker is liable for the full amount of the face value of his paper, and the pledge can in no way either benefit or injure him.<sup>46</sup> And so where the pledgee holds accommodation paper as security, he having obtained the pledge in good faith for a legal and subsisting debt, the presumption attaches that he gave full value for it, and he can recover the full amount due upon the paper to meet the amount of the pledged indebtedness, and in such case the pledgor cannot enjoin the collection of such paper until the creditor holding the same shall first exhaust other securities for the same debt placed with him by his debtor. This has been held to be the rule of law even though the making of such paper was procured by fraud. The presumption that the pledgee paid full value for the paper may, however, be overcome by proof, and if it be shown that the paper is accommodation paper, and that the pledged indebtedness can be satisfied by a less sum than the amount due, then judgment will only be allowed for an amount necessary to satisfy the pledged debt. And in such case the principle of equity, that "where a party has a lien upon two funds, out of either of which his debt can be paid, and another has a lien on one only of the funds for his debt, the latter has a right to compel the former to resort to the other fund in the first instance for the satisfaction of his debt," does not apply; this is applied only to sureties.<sup>47</sup>

<sup>46</sup> *Wilkinson v. Jeffreys*, 30 Ga. 153; *Tarbell v. Stuyvesant*, 26 Vt. 513; *Holeman v. Hobson*, 8 Humph. (Tenn.) 127; *Parish v. Stone*, 14 Pick. (Mass.) 198; *Fisher v. Fisher*, 98 Mass. 303; *Belding v. Manley*, 21 Vt. 550; *Jackson v. Bank*, 42 N. J. L. 177; *Duncomb v. N. Y. Ry. Co.*, 84 N. Y. 190; *Greenwall v. Hayden*, 78 Ky. 332; *Manufacturing Co. v. Falvey*, 20 Wis. 211. "But if notes are assigned as collateral security for a debt, the holder may at the same time, unless there is an agreement to the contrary, bring different suits, one on the original debt and others on the collaterals, and prosecute them all to judgment, and collect on the judg-

ments at least the amount of the original indebtedness and the costs in all the suits. If he collects anything on the collaterals after the indebtedness which they were assigned to secure is paid, he receives it, of course, for the benefit of the assignor." *Bank v. Roberts*, 45 Wis. 373; *Tooke v. Newman*, 75 Ill. 215.

<sup>47</sup> *Fisher et al. v. Fisher et al.*, 98 Mass. 303. "If a negotiable promissory note, which is without consideration as between the original parties thereto, is delivered without consideration to another person, who pledges it, before its maturity, as collateral security for a debt of his own of less amount than the face of the note,

An interesting case where this subject is very thoroughly discussed by counsel and court is *Farwell v. Importers', etc. Bank*.<sup>48</sup> Plaintiffs made their promissory note to their own order which they indorsed to brokers to sell. The brokers, without the plaintiffs' knowledge or consent, delivered said note, with others belonging to themselves, to defendant, as security for a call loan. Before the maturity of said note plaintiffs notified defendant of their rights in respect to it; they paid the note when due. At that time defendant had not received enough from the other collaterals to pay the loan, but thereafter did receive more than enough for that purpose. In an action for an accounting to determine defendant's rights to the proceeds of said note and to compel payment of any portion thereof not necessary to satisfy its lien thereon, held, that having received the note from the ostensible owners in ignorance of the plaintiffs' rights, defendant could hold the same as security; yet the right of property did not pass, but remained in plaintiffs, subject to defendant's lien; and while the latter, as pledgee, had the right to collect the note when due, as the loan had not been paid, the money collected remained as a substitute for the note and subject to plaintiffs' equities, the same as though the note itself had remained uncollected; that after the notice, plaintiffs stood as mere sureties for the loan, to the extent of their note, and before resort was had thereto could compel the application of the proceeds of the securities belonging to the brokers, and when sufficient was received therefrom to satisfy defendant's claim, the proceeds of the note were released from the lien, and plaintiffs were entitled to recover the same.

In *Morris Canal & Banking Co. v. Lewis*<sup>49</sup> the court say: "It was held by this court in the case of *Morris Canal & Banking Co. v. Fisher*, 1 Stock. 667, that the coupon bonds of an incorporated company are transferable by delivery, so that a *bona fide* holder has a good title to them. It rests upon the faith that such bonds are expressly designed to be thus circulated, and to be sold in the stock market like public securities, and that they are universally so used. When bonds of such character, having several years to run before they become due, are de-

the pledgees, if they take it without notice, are to be deemed holders for value, and may maintain an action thereon for the amount

due to them upon the debt which it was pledged to secure."

<sup>48</sup> 90 N. Y. 483.

<sup>49</sup> 12 N. J. Ch. 323.

posited as collateral security for the payment of promissory notes soon to mature, the fair presumption is that they were designed to be held as a pledge, and were expected to be sold, after demand and due notice, like goods, chattels, stocks and public securities, in case the debt for which they were pledged should not be punctually paid. Such a deposit differs entirely from a deposit of ordinary bonds, mortgages, promissory notes, and like choses in action, which, in the absence of an agreement to that effect, the creditor cannot expose to sale, because they have no market value, and it cannot be presumed it was the intention of the parties thus to deal with them." The law throws the same safeguards around such a sale on the foreclosure of the pledge that usually protect the pledgor when the pledged property is corporeal. The sale must be fair and open, and every reasonable effort used to obtain the best price for the property sold, and no more property than is necessary to discharge the pledge will be allowed to be sold.<sup>50</sup> And it has been held that when several different lots of stock have been given to secure the debt, they should be sold separately.<sup>51</sup>

§ 318. *Compromise.*—The pledgee of negotiable paper or choses in action has no right to take a less amount than is due upon the pledged security from the maker, or from those liable upon the security; and it is a general rule that if he does so he becomes liable for the difference between the amount received and the face value of the security, provided there is no contract allowing such a compromise.<sup>52</sup> There are cases where such a compromise has been upheld, and so it may be said that there are exceptions to the rule; as where the maker of the collateral is insolvent and nothing can be collected upon the security by process of law, and the compromise would be for the best interest of both parties. It was so held in *Exeter Bank v. Gordon*.<sup>53</sup> The court say: "It is without doubt a well settled, general rule that the pledgee has no right in such a case to compromise for a less amount than the sum due on the face of the security. There are, however, exceptions to this rule; but ad-

<sup>50</sup> *Newsome v. Davis*, 133 Mass. 343.

<sup>51</sup> *Mahoney v. Caperton*, 15 Cal. 313.

<sup>52</sup> *Zimbleman v. Veeder*, 98 Ill. 613; *Wood v. Mathews*, 73 Mo.

497; *Union Trust Co. v. Rigdon*, 93 Ill. 458.

<sup>53</sup> 8 N. H. 66; *Story on Bailments*, 214; *Bowman v. Wood*, 15 Mass. 534; *Garlick v. James*, 12 John. 146.

mitting for the present that the general rule is applicable to this case, the question will then be, has the wrongful act made the bank accountable for the whole sum due on the note, or only for the value of the note? There seems to be no reason to suppose that the compromise was not, on the whole, highly advantageous to the Gordons and the bank; and the complaint of this defendant is not that anything in fact is lost by it, but that it was made without authority. If the bank had wrongfully taken the note and converted it to their own use, they would have been answerable only for the value. . . . If, then, we follow that analogy in this case, we must hold that the bank is liable only for what it received, if the compromise was on the whole advantageous to all concerned."

A power of sale after default will not authorize the pledgee to sell the security to the maker for a less sum than the face value. Such a sale would not be considered as authorized, but rather as a compromise and so unauthorized.<sup>54</sup> The pledgee is also protected in his holding of the security, and he cannot be compelled, even by the pledgor, to accept a compromise of the security,<sup>55</sup> or to accept any other paper or security in the place of it. The pledgee cannot be compelled to accept anything but money in payment or satisfaction of the pledged indebtedness, in the absence of a contract requiring him to do so; and an offer to turn over to him property, no matter if it be of greater value

<sup>54</sup> *Zimbleman v. Veeder*, 98 Ill. 613. But a pledgee of a promissory note, with a power of sale in case of default, does not authorize the pledgee to compromise with the maker of the note and take less than was due thereon, where the note was well secured and absolutely worth its face value. And a sale by the pledgee of a negotiable promissory note under a contract conferring power to sell for an amount much less than the face value of the note, without notice to the pledgor, will not be regarded as such a sale as the law requires, but rather as a compromise between the pledgee and the maker of the note.

<sup>55</sup> In *Union Trust Co. v. Rigdon*, 93 Ill. 458, it was held "that the surrender by a pledgee of promissory notes as collateral security who has an express written authority to sell at public auction or private sale for a sum less than is due thereon, but which is enough to pay the principal debt, is not a sale within the meaning of the power conferred, but is a compromise which renders the pledgee liable in an action on the case to the pledgor for the injury thereby sustained; and if at the same time he sells other collaterals to the same debtor, the whole transaction being a tort, the pledgor may recover for the whole."

than the amount of the debt, cannot avail the pledgor anything, nor is the pledgee bound, upon such an offer being made, to notify the debtor upon the collateral.<sup>56</sup> On the other hand, should the pledgee accept property as payment of the collateral, he would be liable to account to the pledgor for the full face value of the pledged security. If, however, the debtor consent to a compromise that has been made by the pledgee with those liable upon the collateral, then it would be binding, and this consent may be either express, or implied by the acts of the bailor.

In case of an illegal compromise and surrender of the securities, the pledgor has the option of commencing either of two actions: (1) he may sue the maker or those liable upon the collateral and have judgment for an amount equal to the difference between the amount due upon the pledged indebtedness and the face value of the security; or (2) he may sue the pledgee and have judgment for a like amount.

### SECTION III.

§ 319. **Rights and liabilities of pledgee of stocks and bonds of corporations after default.**—The rights and liabilities of a pledgee of stocks and bonds of corporations after default in not paying the pledged indebtedness are not dissimilar to his rights and liabilities when the pledged property is corporeal. He may bring his action and recover a judgment for the indebtedness and hold and avail himself of the security the same as in the case of corporeal property, or he may foreclose the pledge by giving the usual notice of sale at common law after demand of payment of the debt secured, the law following out the theory already stated, namely, that this kind of property usually has a market value, which can be realized by placing it upon sale. Stocks and bonds are bought and sold in the market without reference to their maturity, and so such pledges may be foreclosed by public sale after demand of payment and due notice of the sale.<sup>57</sup>

<sup>56</sup> *Rives v. M'Losky*, 5 Stew. & P. (Ala.) 330; *Rhinlander v. Barrow*, 17 John. (N. Y.) 538.

<sup>57</sup> *Ind. & Ill. Cent. R. Co. v. McKennan*, 24 Ind. 62; *Merchants'*

*Nat. Bank v. Thompson*, 133 Mass. 182; *Toronto, etc. Co. v. Central, etc. R. Co.*, 10 Ont. L. Rep. 347, 4 Am. & Eng. Ann. Cases, 1163, and cases collected in note.

**§ 320. Stocks held by brokers purchased on margins.**—There is an immense business carried on in this country through brokers, who, for a certain agreed amount advanced to them upon the price of stocks purchased, called margins, advance the balance of the amount necessary to make the purchase for the customer, the broker holding the stock and the margin as his security for the purchase price advanced by him, having at all times the right to demand and have paid to him sufficient further amounts, or margins, to make the stocks sufficient security for the amount due from the customer upon them. Such transactions are embraced in the law of pledge; the broker being the pledgee, the customer for whom he holds the stocks upon margins the pledgor, and the amount remaining due upon the stocks for the purchase price thereof, the pledged indebtedness. It must be admitted that the course of business, and the rights and liabilities of the parties, somewhat differ in these particular transactions from that of the ordinary pledging of property as security for the payment of a debt, but nevertheless the questions involved must be settled by the rules of law applicable to pledgor and pledgee.

**§ 321. Custom, usage and course of business.**—The rules of law fixing the rights and liabilities in this kind of business are the result of the business customs and usages which have been adopted and acquiesced in by brokers and customers; the known and recognized rules and regulations of boards of trade and stock exchanges, the agreements of the parties expressed as well as implied by the long-continued and well-understood course of business. The customer, no doubt, has the right to redeem the stock by paying to the broker the amount due upon it, and in such case the broker would be bound to deliver to him the certificate of the stock purchased, and, in case of failing or refusing to do so, would be subject to the usual liability of a bailee in such cases; and this right to redeem, as in other cases, exists so long as the pledge remains unfoeclosed.

**§ 322. Foreclosure of the pledge where stocks are held on margins.**—The foreclosure of the pledge in such cases differs somewhat from the foreclosure of the ordinary pledge where the property is corporeal, or where it is stocks and bonds of corporations, already noticed. Here the parties are largely governed by customs, rules and regulations that have become known and established, and have been recognized and agreed to at the time

of the purchase, and, by the very fact of the purchase, are understood between the parties to have been agreed to. The margins, as we have seen, have been paid to the broker from time to time to keep his security good for the amount advanced. These amounts or margins must, of course, be reasonable, but are fixed by the broker and must be paid by the customer after reasonable notice. There is no fixed time when the whole amount due for purchase price shall become due and payable; it is presumed that at some time the stocks are to be paid for, and that time may be said to be within a reasonable time, and at that time the broker has the right to demand that the business be closed. Should the customer fail upon reasonable notice to pay the margins demanded, or fail after a reasonable time, and upon demand and reasonable notice, to pay the amount due the broker for advances, in either case the broker may sell the stocks in the market at their then market value and close up the account, accounting to the customer for the amounts received upon the sale and for the margins which have been paid, if he can do so, after reserving for himself the full amount advanced with interest and commissions. No public sale is required. Custom and usage and the general and usual course of trade has fixed and settled this as the legal foreclosure, and after such sale, if it is free from fraud, there is no redemption.<sup>58</sup>

<sup>58</sup>In *Denton v. Jackson*, 106 Ill. 433, it was held: "In the absence of any contract between a broker and customer with regard to notice of sale, and of any rule of the board of trade, the common law would govern regarding reasonable notice to the customer to make his margin good in order to justify the sale." In *Graman v. Smith*, 81 N. Y. 25: Where stocks are held by a broker for a customer on a margin, it is a part of the contract that if the stock depreciate the margin shall be kept good on demand, and, upon failure to do so, the stocks may be sold upon reasonable and customary notice; but where the stock depreciates and a call for additional mar-

gin is made and complied with, and afterwards a second call is made which is not complied with, and the broker sells the stock without notice, the sale is irregular and constitutes a conversion. In *Hanks v. Drake*, 49 Barb. 186: The notice required in the case of a sale of pledged stock as security for the payment of money advanced thereon is not required in the case of a purchase by brokers as agents advancing money therefor, but the brokers must give the customer notice that his margin is diminished and that they require a further margin, and a reasonable time must be given him in which to comply before the stock can be sold. *Worthington*



## SECTION IV.

## § 323. The rights and liabilities of the pledgor after default.

The pledgor has a right at any time before foreclosure of the pledge to redeem his property from the lien thereof by paying the debt or obligation, or the amount due upon the pledge, or, in case of the refusal of the pledgee to accept that amount, by tendering to him the amount due. But if the pledgor should fail to do this, and by reason of his default in not paying the debt for which the property was pledged when due, the pledgee should legally foreclose the pledge and sell the property, the pledgor's rights and interests in the pledged property would be gone, and he would have no further right of redemption. But in order to cut off the pledgor's right to redeem, the foreclosure must be legal and regular, otherwise the pledgor would have a right of action as for conversion of the property, and might, even after such foreclosure, tender to the pledgee the amount due and recover the pledged property.

§ 324. The pledgor may waive irregularity.—The pledgor may, however, by express or implied ratification of the foreclosure sale, or otherwise, waive the irregular or illegal procedure of the pledgee. As, for example, where the pledgee sold the property without giving the proper notice; or where he sold it at private sale, having no authority to do so, and the pledgor accepts, after such irregularities, the money received, and appropriates it to his own use after knowing all the facts; or where the pledgor stood by and witnessed the illegal or irregular disposition of the property on foreclosure of the pledge, allowing *bona fide* purchasers to buy the property, making no objection, in such cases the pledgor would be estopped from taking advantage of the irregular or illegal proceeding.<sup>59</sup>

§ 325. — Redemption in equity.—Equity will not, except in very unusual cases, take jurisdiction and decree a right of

v. Tormey, 34 Md. 182. The New York court of appeals has held: The relation existing between a customer and a broker with reference to stocks purchased by the broker on a margin for the customer is that of pledgor and pledgee, and if the broker sells the stock without demanding additional margin or giving the customer reasonable notice of the

sale, it will be wrongful and operate as a conversion. Gillett v. Whiting, 120 N. Y. 402; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80.

<sup>59</sup> Hamilton v. State Bank, 22 Iowa, 306; Gallagher v. Jones, 129 U. S. 193. And a sale of a pledge by a pledgee cannot be avoided on the ground that no demand was made on the pledgor for pay-

redemption in this class of cases, for the reason that the legal remedy is generally adequate and gives full and complete relief. The pledgor may, upon satisfying the pledged indebtedness, or offering to do so by legally tendering the required amount, recover the pledged property by an action of replevin or its value in an action of trover in case the pledgee should refuse to deliver the property. The legal title to the property, it will be remembered, is always in the pledgor; it has only been incumbered by a special lien or right of possession, which is satisfied and removed when the pledged indebtedness is satisfied, so that the pledgor then has the title and right to possession unincumbered, and the law will give him the property. In this respect a pledge differs from a mortgage. By the mortgage, the property mortgaged is conveyed subject to a defeasance clause, while in case of a pledge the title remains in the pledgor; and so, even where by the agreement pledging the property it is stipulated that upon failure to pay the indebtedness upon a certain due day the property shall become the property of the pledgee absolutely, this agreement, being void, will not affect the right of the pledgor to redeem at any time after the due day and prior to a legal foreclosure of the pledge; and in such case the remedy at law is adequate.<sup>60</sup>

§ 326. Equity in some cases will take jurisdiction.—If the redemption involves a long and difficult accounting, such an accounting as belongs to the jurisdiction of a court of equity, the equitable remedy might be invoked; or if some special reason existed, as that a discovery was wanted.<sup>61</sup> So in case certificates of stock have been transferred to the pledgee upon the books of the company, the pledged property thus having passed to the pledgee, he having the legal title and refusing to reconvey, a

ment, and that the pledgee did not give the pledgor any notice of the time and place of sale, and that the sale was not at a public auction, where the pledgor attended the sale and did not object to it, but made a bid, and after the sale the pledgor, with the pledgee and purchaser, joined in celebration of the sale, and the sale was held in a room which, though generally open only to members of the board of trade,

was open to the public at the time of the sale.

<sup>60</sup> Genet v. Howland, 45 Barb. (N. Y.) 560; Doak v. Bank, 6 Ired. (N. C.) 309.

<sup>61</sup> Story on Eq. Jur. sec. 1032; Hasbrouck v. Vandervoort, 4 Sand. (N. Y.) 74; Kemp v. Westbrook, 1 Ves. 278; White Mt. R. Co. v. Bay State Iron Co., 50 N. H. 57; Durant v. Einstein, 35 How. Pr. (N. Y.) 223; Beatty v. Silveston, 3 Nev. 228.

court of equity will decree a reconveyance upon the pledge being satisfied; for in such case the legal remedy would not be adequate.<sup>62</sup>

§ 327. **Accounting for the pledged property.**—Whether the property pledged be corporeal or incorporeal, as promissory notes, bonds, mortgages or negotiable paper, or choses in action, or whether it be bonds or stocks of corporations, or stocks held upon margins, when the pledged indebtedness is discharged or satisfied, it becomes the duty of the pledgee to faithfully and fairly account for all the proceeds of the pledged property, and all the moneys or benefits that he has received on account of the pledge, and to redeliver to the pledgor all that remains in his hands which has not been legally disposed of; for when the object of the pledge has been carried out and ceases to operate, the whole beneficial interest in the pledged security vests absolutely in the pledgor, and it becomes the duty of the pledgee to redeliver the pledged property or to account for it.

§ 328. **Termination of the relation.**—The pledge may be terminated (1) by redelivery of the property, (2) by payment of the debt or performance of the obligation, (3) by tender of the amount due, (4) by loss or destruction of the pledged property, (5) by sale by the pledgee or by his misuse of the property, (6) by merger, and (7) at the pledgor's option, by conversion by the pledgee.

These several ways of terminating the relation have been more or less discussed and we need but call attention to them in this connection.

(1) *By redelivery of the property.*—Possession of the property is essential to a valid pledge; and while, as between the pledgor and pledgee, the pledged relation might not be extinguished by a temporary redelivery of the property, as between *bona fide* purchasers or creditors of the bailor, the pledge would be at an end. The parties, of course, could terminate the relation by an agreement to that effect.

(2) *By payment of the debt.*—This has been fully discussed. The pledge only exists for the purpose of securing the payment of the debt or performance of the obligation, and when that is done it goes without saying that the lien of the pledge could have no further existence.

<sup>62</sup> Bryson v. Reynor, 25 Md. 242; Hasbrouck v. Vandervoort, 4, Sand. (N. Y.) 74.

(3) *Tender of the amount due.*—Tender of the amount due, and a demand for the redelivery of the property, would, as we have seen, work the same result as a payment or performance of the obligation.

(4) *By loss or destruction of the pledged property.*—In such case the pledge or lien of the property would cease, because there would be no subject-matter to which it could attach. The question of liability might be important. The bailee is bound, as we know, to exercise ordinary diligence in the care of the property; so if it was lost through his fault, the pledgor would be entitled to a release of the indebtedness to the extent, at least, of the value of the property; and if the value of the property should exceed the amount of the indebtedness, to a judgment for the excess. If the loss were not occasioned by the fault of the bailee, or if it were occasioned by the fault of the bailor, then the debt would in no way be extinguished by reason of the loss.

(5) *By sale of the pledged property or by his misuse of it.*—If the pledgee without authority undertakes to sell the pledged property and thus deprives the pledgor of it, or if he misuses it, thus violating the object of the pledge and the implied agreement, it would be held to be a conversion upon his part and the lien of the pledge would be extinguished, and the pledgee in such case would be liable for the damage occasioned by such a conversion.

(6) *By merger.*—Where the pledgee purchases the title of the pledged property from the pledgor, he would own both the title and the right to the possession, and the lien of the pledge would merge in the title thus purchased by the pledgee.

(7) *By conversion.*—Conversion may be the result of the illegal procedure of the bailee. So long as the debt remains unpaid and is not barred by the statutes of limitation, and the bailee has not been guilty of a misuse of the property, or of some of the acts which would terminate the lien, there can be no conversion.

When for any reason the lien of the pledge has been extinguished, it is the duty of the pledgee to redeliver the property pledged, or the balance remaining in his hands, and he cannot avoid this duty unless it transpires that the pledgor was not the real owner, and in that case he must deliver it to the real owner. Should he fail upon demand to so redeliver the property or to account for it, the pledgor, or the real owner, could at his option bring an action to recover the property or its value.



## PART THIRD

# INNKEEPERS AND BOARDING-HOUSE KEEPERS

## CHAPTER I.

### INNS AND INNKEEPERS.

§ 329. An inn.

330. Who are innkeepers.

331. The test.

§ 332. Some essential characteristics.

333. Restaurants and cafes.

Thus far we have discussed ordinary bailments, that is, that class of bailments which falls within the ordinary liability that attaches to bailees. We are now to discuss one of the classes of extraordinary bailments, *i. e.*, a bailment where the liability which attaches is extraordinary.

§ 329. **An inn.**—While the origin and history of the inn would no doubt be of interest and profit to the student, we cannot expect to give here in detail more than may be deemed sufficient to help us to comprehend the reasons for the extraordinary rules of liability that the law has attached to the innkeeper, in its efforts to surround the guest with what was, in the early days at least, deemed a necessary protection.

An inn has been defined to be “a public house for entertainment for all who choose to visit it.” In discussing this subject our thoughts are at once occupied with the history of the old English inns and the French hostelries so prominent in the earlier history of travel and entertainment in those countries. We remember the descriptions of the scenes of revelry and good cheer, and often the danger, the riot and robbery. The smoking mugs of hot-brewed ale, with hot brandy and water quaffed amid the curling tobacco smoke of the bar-room, help to set the picture. Such scenes were seldom if ever interrupted except by the arrival of a cavalcade of travelers making their way through

a dangerous and almost roadless country, or the winding of the blasts from the trumpet of the coach-driver as he approached the inn where passengers, travelers, servants and animals were to be refreshed and cared for. It was the place where "everything needed for the traveler on his way" was supposed to be kept and furnished for hire, whether it be for man or beast; so within the curtilage of the inn were found not only the house that sheltered, and warmed, and furnished entertainment for the guest and his servants, but the yards, barns and stables where the animals and vehicles that brought the guests were cared for. The inn comprised all these, and all these were said to be the inn.

The definition in *Lacey v. Thompson*,<sup>1</sup> by Best, J., gives us something of an idea of the English inn; "A house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." And the definition of Bailey, J., found in the same case: "A house where a traveler is furnished with everything which he has occasion for while on his way." These definitions, it will be noticed, include both solids and fluids, whatever the traveler "has occasion for while on his way," whatever it be that is desired by him to eat or to drink. So it would seem that it was essentially a place where not only provisions were furnished, but where wines, spiritous or malt liquors were provided for those who patronized the inn. And not only this, but the inn of greatest completeness must furnish, as well, entertainment for the horses or animals of the guest as well as for the guest himself. It need not be said that long since it has been held that very many of these essentials of the earlier inn are not necessary or furnished in the hotel or public house for the entertainment of travelers and guests of modern days.

A very interesting history of the inns of the earlier days is given in the opinion of Mr. Justice Daly in the case of *Cromwell v. Stevens*, a New York case.<sup>2</sup> He says: . . . "The word is of French origin, being derived from '*hostel*,' and more remotely from the Latin word '*hospes*,' a word having a double signification, as it was used by the Romans both to denote a stranger who lodges at the house of another, as well as the master of the house who entertains travelers or guests. Among the

<sup>1</sup> 3 B. & Ald. 283; 5 Ecl. 285.

<sup>2</sup> 2 Daly, 15.

Romans it was a universal custom for the wealthier classes to extend the hospitality of their house, not only to their friends and connections when they came to the city, but to respectable travelers generally. They had inns, but they were kept by slaves, and were places of resort for the lower orders, or for the accommodation of such travelers as were not in a condition to claim the hospitality of the better classes. On either side of the spacious mansions of the wealthy patricians were smaller apartments known as the '*hospitium*,' or place for the entertainment of strangers, and the word *hospes* was a term to designate the owner of such a mansion, as well as the guest whom he received. This custom of the Romans prevailed in the earlier part of the middle ages. From the fifth to the ninth century traveling was difficult and dangerous. There was little security except within castles or walled towns. The principal public roads had been destroyed by centuries of continuous war, and such thoroughfares as existed were infested by roving bands who lived exclusively by plunder.

"In such a state of things there could be little traveling, and consequently the few inns to be found were rather dens to which robbers resorted to carouse and divide their spoils than places for the entertainment of travelers. The effect of a condition of society like this was to make hospitality not only a social virtue but a religious duty, and in the monasteries and in all the great religious establishments provision was made for the gratuitous entertainment of wayfarers and travelers. Either a separate building or an apartment within the monastery was devoted exclusively to this purpose, which was in charge of an officer called the hostler, who received the traveler and conducted him to his apartment, which was fitted up with beds, where he was allowed to tarry for two days, and to have his meals in the refectory, while, if he journeyed upon horseback, provender was provided by the hostler for his beast in the stables. In many countries this apartment, or guest hall, of a monastery retained the original Latin name of *hospitium*, but in France the word was blended with *hospes* and changed into *hospice*, and it afterward underwent another change. As civilization advanced, and the nobility of France deserted their strong castles for spacious and costly residences in the towns, they erected their mansions upon a scale sufficiently extensive to enable them to discharge this great duty of hospitality, as is still, or was very recently, the custom



among the nobility and wealthier classes in Russia, and in some of the northern countries of Europe. Borrowing, by analogy, from an existing word, and to distinguish it from the guest house of the monastery, every such great house or mansion was called a *hostel*, and by the mutation and attrition to which these words are subject in use, the 's' was gradually dropped from the word, and it became hotel. As traveling and intercourse increased, the duty upon the nobility of entertaining respectable strangers became too onerous a burden, and establishments in which this class of persons could be entertained by paying for their accommodation sprung up in the cities, towns, and upon the leading public roads, which, to distinguish them from the great mansions or hotels of the wealthy, and at the same time to denote that they were superior to the *auberge* or *cabaret*, were called *hostelries*, a name which has been in use in France for several centuries, and is still in use to some extent as a common term for inns of the better class, while the word 'hotel,' in France, has long ceased to be confined to its original signification, and has become a word of most extensive meaning.

"The Saxon word *inn* was employed to denote a house where strangers or guests were entertained, down to the time of the Norman invasion; and under the Norman rule it was in the popular tongue the word for the town houses in which great men resided when they were in attendance on court, several of which became afterwards legal colleges under the well-known title of 'inns of court.' In all legal proceedings, however, and wherever the Norman French was spoken, the word *hostel* was the term for all such establishments. The places where entertainment could be procured for a compensation, to distinguish them from the inns or great houses where it was furnished gratuitously, were called in English common inns; while in Norman French, by a change analogous to that which had occurred in France, they were first called *hostelries*, and afterward *hostries*. To 'host' was to put up at an inn; and 'hostler,' before referred to as the title of the officer in the monastery who was charged with the entertainment of guests, was the Norman word for innkeeper, and was in use until about the time of Elizabeth, when, the keeping of horses at livery becoming a distinct occupation, it was the term for the keeper of a livery-stable.

"It appears from a note of Malone, referred to in Todd's edition of Johnson's Dictionary, that the word 'hotel' came into use

in England by the general introduction in London, after 1760, of the kind of establishment that was then common in Paris, called an *hotel garni*, a large house, in which furnished apartments were let by the day, week or month. In Barclay's Dictionary (1772), in the first edition of Walker (1791), and in Sheridan's Dictionary (1795), hotel is given as the proper pronunciation of *hostel*, an inn; and in the dictionaries of Jones (1798) and of Perry (1805) it is incorporated as an English word, and is defined in the latter to be a 'lodging-house for the accommodations for gentlemen and genteel families.' Todd (1814) defines it to be 'a lodging-house for the accommodation of occasional lodgers, who are supplied with apartments hired by the night or week.' The definition given by Knowles (1835) is simply 'an inn;' Beid (1845), 'an inn or a lodging-house;' Boag (1848), 'an inn;' and by Dr. Latham, in his edition of Johnson's Dictionary, 'an inn of a superior kind.' . . .

"It is to be deduced from the origin and history of the word, and the exposition that has been given of it by English and American lexicographers, that a hotel, in this country, is what in France was known as a *hostellerie*, and in England as a common inn of that superior class usually found in cities and large towns. A common inn is defined by Bacon to be 'a house for the entertainment of travelers and passengers in which lodging and necessaries are provided for them and for their horses and attendants.' . . . But a more practical idea of what was understood at the common law as common inns may be gathered from Hollingshed's description of them as they existed in the day's of Elizabeth. 'Every man,' says that quaint chronicler, 'may in England use his inn as his own house, and have for his monie how great or how little varitie of vittals and whatsoever service himself shall think fit to call for. If the traveler have a horse, his bed doth cost him nothing, but if he go on foot, he is sure to pay a penny for the same. Each comer is sure to be in clean sheets wherein no man hath lodged since they came from the laundress, or out of the water wherein they were washed. Whether he be horseman or footman, if his chamber be once appointed, he may carry the key with him as of his own house as long as he lodgeth there. In all our inns we have plenty of ale, biere and sundrie kinds of wine; and such is the capacitie of some of them that they are able to lodge two hundred or three hundred persons and their horses at ease, and with very short

warning (to) make such provision for their diet as to him that is unacquainted withall may seem to be incredible.' And another observer (Fynes Moryson), writing before 1614, adds: 'If the traveler eats with the host or at the common table his meals cost him sixpence, and in some places fourpence; but if he will eat in his chamber he commands what meat he will, and the kitchen is open to him to order the meat to be dressed as he likes best.' " This perhaps is sufficient as to the early history of the inn.

§ 330. **Who are innkeepers.**—Judge Cooley in his work on Torts adopts the following definition: "An inkeeper is one who holds himself out to the public as ready to accommodate all comers with the conveniences usually supplied to travelers on their journey." <sup>3</sup>

In *Howth v. Franklin* the court defines the innkeeper to be "one who holds himself out to the public as engaged in the business of keeping a house for the lodgment and entertainment of travelers and passengers, their horses and attendants for reasonable compensation." <sup>4</sup>

Some fine distinctions have arisen and occupied the attention of the courts as to who are innkeepers. Every person who furnishes to the traveler entertainment for himself and attendants is not an innkeeper. One who occasionally entertains travelers for compensation when it suits his pleasure, and who does not hold himself out as the keeper of a house for the accommodation of the traveling public, is not an innkeeper. For example, persons whose houses are situated along the public roads of the country, as farmers living upon farms who occasionally or even frequently take in and accommodate travelers and receive compensation therefor, are not innkeepers, nor are they liable as such, nor are keepers of restaurants and eating-houses, or those giving entertainment only occasionally, or persons keeping lodging and boarding houses, or sleeping-car and steamship companies, for these do not hold themselves out as ready to furnish accommodation for all comers; and it has been held that keepers of hotels at summer resorts and watering places are not in a strict sense innkeepers.

§ 331. **The test.**—The test may be seen in the definition, "one who holds himself out to the public as ready to accommodate all comers with the conveniences usually supplied to travelers on

<sup>3</sup> Cooley on Torts (2d ed.), 757.      <sup>4</sup> 20 Tex. 798.

their journeys;" in other words, he who solicits the public to come to his inn for entertainment; who proclaims by word or action that he will entertain all who come who will pay the price for the entertainment and are fit to be entertained. It may be said to be a public employment, and this is a characteristic distinguishing the innkeeper from a mere boarding-house keeper; so that among the essential characteristics which constitute the place an inn is the supplying to the traveling public needed entertainment.

§ 332. **Some essential characteristics.**—The accommodation of the guests of the inn is the principal object for which the inn is kept; to furnish food, lodging, entertainment and care as the public demand. In *Lewis v. Hitchcock*<sup>8</sup> the court say: "A coffee-house, or a mere eating-house, is not an inn. To constitute an inn there must be some provision for the essential needs of a traveler upon his journey, namely, lodging as well as food. These two elements of an inn may doubtless be present in very disproportionate degrees as the needs of the situation may require, but both must in some degree be present to constitute an inn."

§ 333. **Restaurants and cafes.**—Something more than the mere providing of food for the guest or customer seems to be essential to the inn. The restaurant or cafe usually provides no care for the customer; that is, does not look after his baggage, or provide a place to stay. One has not that thought in connection with it that is coupled with the thought of the inn, namely, a temporary home for the guest, a place where he can rest and for the time call it his domicile. On the contrary, the ordinary restaurant or cafe is simply a place where the customer or guest can sit at the table and be provided with food and nourishment. Ordinarily it means an eating-house; not infrequently a bar-room is a part of it. However, a restaurant may be an inn if it has in connection with it apartments for its customers where lodgings are furnished, and the ordinary and usual essentials that belong with the inn are provided. In such case, of course,

<sup>8</sup> 10 Fed. 6; Story on Bailments, sec. 475; *Carpenter v. Taylor*, 1 Hill, 192; *Wintermute v. Clark*, 2 Sand. 242; *People v. Jones*, 54 Barb. 316. In *Walpert v. Rohan*, 126 Ga. 532, 6 L. R. A. (N. S.) 828, held one keeping a bath house in

connection with his inn where his guests and the general public might obtain baths for hire, as to such bath house was not subject to the liability of an innkeeper, and in the notes several cases are collected supporting the case.

the obligations resting upon the restaurant-keeper would be similar to those of the innkeeper. In the case of *Kopper v. Willis*,<sup>\*</sup> Chief Justice Daly, in discussing this question, says: "In *Cromwell v. Stevens* (2 Daly, 15), I had occasion to examine what constitutes an innkeeper, not only by a review of the adjudged cases in which that question has been considered, but by an historical inquiry into the origin and reason of the rule that innkeepers are responsible for the loss of the property of their guests; in which I came to the conclusion, from the authorities, that an inn is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied, at a reasonable charge, with their meals, lodging, refreshments, and such services and attention as are necessarily incident to the use of the house as a temporary home. That a mere restaurant or eating-house is not an inn, nor a mere lodging-house, in which no provision is made for supplying the lodgers with meals; and that in respect to houses for the entertainment of travelers, of which there are many in this and other cities; where the guest or traveler pays so much a day for his room, and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal, as he takes it, they are to be considered inns, if the restaurant forms part of the establishment and the whole house is kept under one general management for the reception of all guests or travelers that may come there."

As to sleeping-car and steamboat companies the authorities are not entirely harmonious as to their liability as innkeepers. Their duties are in many respects quite similar, and the same reasons that occasioned the laying upon the innkeeper the extraordinary liability largely exists in the case of the sleeping-car company or the steamboat company; but while this is true, the great weight of authority holds that sleeping-car companies are not innkeepers or liable as innkeepers, but as to steamboat companies the question is by no means settled. While the innkeeper is bound to receive as guests all who may apply at his inn who are suitable and ready and willing to pay the price of the entertainment, the sleeping-car companies limit their accommodations to those persons who have purchased first-class tickets upon their

<sup>\*</sup> 9 Daly, 460.

train, and do not hold themselves out to furnish anything except a place to sleep while upon the journey; the passenger not having the privilege of a room where he can lock the door and guard against persons who seek to enter, but the accommodations are simply in accordance with an express contract that has been made with the company. Neither does the company undertake to care for any property or goods of the traveler.

In *Pullman Car Co. v. Smith*<sup>1</sup> the court say: "The innkeeper is obliged to receive and care for all the goods and property of the traveler which he may choose to take with him upon the journey. Appellant (meaning the Pullman Car Co.) does not receive pay for nor undertake to care for any property or goods whatever, and notoriously refuses to do so. The custody of the goods of the traveler is not, as in the case of the innkeeper, accessory to the principal contract to feed, lodge and accommodate the guest for a suitable reward, because no such contract is made. The same necessity does not exist here as in the case of a common inn. At the time when this custom of an innkeeper's liability had its origin, wherever the end of the day's journey of the wayfaring man brought him, there he was obliged to stop for the night, and intrust his goods and baggage to the custody of the innkeeper. But here the traveler was not compelled to accept the additional comfort of a sleeping-car; he might have remained in the ordinary car; and there were easy methods

<sup>1</sup> 73 Ill. 364; *Lewis v. New York Sleeping-car Co.*, 143 Mass. 267. "A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and when it sells a ticket it impliedly stipulates to do so. It invites passengers to pay for and make use of its cars for sleeping, all parties knowing that during the greater part of the night the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door guard against danger. He has no right to take such steps to protect himself in a sleeping car, but by the necessity

of the case is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise. The law lays the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or an innholder, yet it is its duty to use reasonable care to guard the passengers from theft, and if through want of care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it." *Woodruff Sleeping & Parlor Car Co. v. Diehl*, 84 Ind. 474, 6 Ky. L. Rep. 279.

within his reach by which both money and baggage could be safely transported." The supreme court of Nebraska, however, gives us an adverse holding to that of the great majority of the courts in this country. In the case of *Pullman Palace Car Co. v. Lowe*<sup>\*</sup> the court say: "Except in the matter of furnishing meals, there seems to be no essential difference between the accommodations at an inn and those on a sleeping-car, except that the latter are necessarily on a smaller scale than at an inn. In both cases the porter meets the traveler at the door and takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveler is not required to sit in his seat during the day, but may, if he so desires, go forward into the other cars on the train, and at stations go out on the platform. . . . If it is said that it would be unjust to hold the company to the same liability as an innkeeper because thieves might engage one or more berths in a car, and at the first opportunity leave the car carrying what articles they could steal before leaving; the same is true of an innkeeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterward steal what they can and escape, yet no one would contend that the inn-keeper would not be responsible for the property so stolen, and this whether it is stolen at night or in the day-time; yet in many of the large inns of this country at least, there are numerous doors for ingress and egress, while in a sleeping-car there are but two. Were meals served on a sleeping-car no one would contend that it differed from an inn in its accommodations."

But the great weight of authority is that sleeping-car companies are not innkeepers, and they are not subject to the extraordinary liability that attaches to the innkeeper. In *Clark v. Burns*<sup>\*</sup> the court say: "The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation." However, in case of steamboat companies, the authorities do not agree. There is a line of authorities which holds that where the passenger has been assigned

<sup>\*</sup> 28 Neb. 239.

<sup>\*</sup> 118 Mass. 277.

to a stateroom in a steamboat, of which he has charge similar to that of a guest of an hotel, the extraordinary liability would attach that attaches to the hotel-keeper, and that in such case the steamboat company would be placed upon the same footing as the innkeeper. In Michigan the supreme court divided upon the question in the case of *McKee v. Owen*.<sup>10</sup>

<sup>10</sup> 15 Mich. 115; *Adams v. N. J. Steamboat Co.*, 151 N. Y. 163. In this case the briefs will be found very full, citing cases in support of the different doctrines, while the case itself holds that the

steamboat company is liable to the same extent as an innkeeper, but distinguishes between the liability of the steamboat company and the Pullman Car Company.



## CHAPTER II.

### GUESTS.

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| <p>§ 334. Who are guests.<br/>335. How far traveled, immaterial.<br/>336. A guest or a boarder.<br/>337. Length of time—Contracts for rates will not always determine.<br/>338. Personal presence of the guest.<br/>339. The furnishing of what accommodations necessary.<br/>340. Mere visitors.</p> | <p>§ 341. The length of time one remains, immaterial.<br/>342. The purpose for which one uses the inn.<br/>343. Who must the innkeeper receive as guests.<br/>344. Limitations.<br/>345. Liability for refusing to receive a guest.<br/>346. May refuse to receive.<br/>347. When a guest is taken ill with contagious disease.<br/>348. Disorderly conduct.</p> |
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§ 334. Who are guests.—The definition of an inn, already given as “a public house of entertainment for all who choose to visit it,” indicates who are, in a legal sense, guests of the inn. Some of the authorities have considered it a requisite, in determining who are guests, that they should be travelers or wayfarers, and some of the courts have adopted that idea in distinguishing them from boarders or from residents of the place; but the better opinion seems now to be that it is not essential that the persons should come from any distance, and the definition supported by the weight of authority would seem to be the one adopted by Carpenter, J., in *Walling v. Potter*:<sup>1</sup> “A guest is one who patronizes an inn as such.”

<sup>1</sup> *Walling v. Potter*, 35 Conn. 183. The defendant, it was admitted, was an innkeeper. The plaintiff and defendant both resided in the town of Kent, and the inn was in Kent about half a mile from the plaintiff's residence. The plaintiff came to the inn on an evening, stayed there over night and took breakfast there,

and paid the defendant for his night's lodging and breakfast his usual charge for such entertainment. The plaintiff claimed that on these facts he was a guest at the inn and entitled to treat the defendant as innkeeper and hold him responsible as such. The defendant claimed that the plaintiff was not a traveler or a wayfaring

In *Wintermute v. Clark*<sup>2</sup> the court say: "In order to charge the defendant as an innkeeper it was not necessary to prove that it was only for the reception of travelers that his house was kept open."

§ 335. **How far traveled, immaterial.**—A townsman or a neighbor may be a guest at an inn as well as one who has traveled hundreds of miles or from another country. It is not a question of distance, but rather one of intention on the part of the person who applies for entertainment. If he seeks the privileges of the inn, asking for entertainment as a guest, it is enough, and he must be so received.<sup>3</sup> It has been said that any one away from home, receiving accommodations at an inn as a traveler, is a guest and entitled to hold the innkeeper responsible as such.

§ 336. **A guest or a boarder.**—The discussion as to who are guests at once suggests the inquiry as to who are boarders. It is

man and not a guest at the inn so as to be authorized to charge the defendant as an innkeeper for the loss claimed. The court held in that case that distance was not material; that a townsman or neighbor may be a traveler, and therefore a guest at an inn; that if he resided at the inn his relations would be that of a boarder, but if he resided away from it, whether far or near, and came in for entertainment as a traveler, and received it as such, paying the customary rates, there were no reasons why he should not be held to be a guest and entitled to the rights and privileges of a guest. Where one went to an inn and was received as a guest the fact that after he had remained a week he was charged at a weekly rate did not change his status. *R. L. Polk & Co. v. Melenbacker*, 136 Mich. 611, 99 N. W. 867. One who lived for seventeen months at a hotel which was kept for transients and lodgers, who moved property to his room, indicating an intention to make more

than a temporary sojourn, and who made arrangements to stay at the hotel with the proprietor instead of the clerk, was held not a traveler and guest within the rule making an innkeeper an insurer of the property of his guest. *Crapo v. Rockwell*, 94 N. Y. S. 1122. One away from home who receives accommodations at an inn as a traveler, held to be a guest. *Pullman, etc. Car Co. v. Lowe*, 28 Neb. 239, 6 L. R. A. 809; *Fay v. Pacific, etc. Co.*, 93 Cal. 253, 16 L. R. A. 188. Persons entering the hotel for pleasure or profit to be derived from intercourse with inmates are not guests, and are there by an implied license of the innkeeper who may revoke the license and expel them at any time. *State v. Steel*, 106 N. C. 766, 8 L. R. A. 516, and notes. Otherwise if he enters with *bona fide* intention of becoming a guest. *Ib.*

<sup>2</sup> *Wintermute v. Clark*, 5 Sandf. 242.

<sup>3</sup> In *Curtis v. Murphy*, 63 Wis. 4, the court say: "In these definitions the prominent idea is that a

important that we should be able to determine this, as it often fixes, as we shall see, the extent of the liability of the innkeeper. For a better understanding of the question we have therefore deemed it best to discuss these questions together. The liability of the innkeeper is based largely upon public policy. From the fact that persons traveling through the country are of necessity compelled to put up at inns, for entertainment—*transeuntes causa hospitandi* (from which last word they are called guests),—without knowing anything about the character of the house, the law gives an assurance of the safety of their property and themselves.

Say the court, by Parsons, J., in *Neal v. Wilcox*:<sup>4</sup> "It is sometimes difficult to draw the line between guests and boarders; they frequently run into each other like light and shade, so the line between a common carrier and a bailee to carry is sometimes scarcely perceptible; but the law makes the distinction and it is the province of the judge to draw the line. A transient customer at an inn, although he be not a traveler or stranger, is considered as a guest. A lodger who sojourns at an inn and takes a room for a specified time and pays for his lodging on a special agreement, as by the month or week, is a boarder. So the reason restricts the action to one who comes for entertainment *causi hospitandi*."

§ 337. Length of time—Contracts for rates will not always determine.—It cannot be said, however, that it can always be determined whether one is a boarder or a lodger from the fact that he has made a contract to remain for a certain length of time, or that he is to have reduced rates. The traveler who is to stay but for a night may have a contract for reduced rates; on the other hand, one who is to remain for a considerable length of time may have no such contract and may be considered as a transient. It has been said that it depends more upon the status of the person. Is he a transient or is he a traveler? Or is he one who is intending to stay, to become settled at the place as

guest must be a traveler, wayfarer or a transient comer to an inn for lodging and entertainment. It is not now deemed essential that a person should have come from a distance to constitute a guest. 'Distance is not material.'

A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance or from a foreign country."

<sup>4</sup> 4 Jones L. Rep. (N. C.) 148.

his home? If he is at the inn expecting to remain and make the place his home for a definite period, and at a fixed rate by the week or the month, there can be little question that his status would be that of a boarder.

In *Moore v. Long Beach Co.*,<sup>8</sup> the plaintiff having arranged for a long stay with his family, it was held that he was a boarder. In *McGee v. Pacific Imp. Co.* it was held that the question was one of fact to be determined by the court upon all the evidence before it. "Whether the plaintiff made a special arrangement respecting her stay with the defendant was only evidence to be considered by the court in determining the ultimate fact whether she was a guest or a boarder. Even if the finding of the court that she had made special arrangements with the defendant for board and lodging by the week had been sustained by the evidence, that fact would not be determinative of the issue whether she was a guest or a boarder, but would be merely evidence to be considered in determining that issue."<sup>9</sup>

<sup>8</sup> 87 Cal. 483; *McGee v. Pacific Imp. Co.*, 98 Cal. 678, 93 Cal. 253; *Pinkerton v. Woodard*, 33 Cal. 597, 91 Am. Dec. 657; *Hancock v. Rand*, 17 Hun (N. Y.), 279, 94 N. Y. 1, 46 Am. Rep. 112; *Hall v. Pike*, 100 Mass. 495; *Fay v. Pacific Imp. Co.*, 98 Cal. 259. "An innkeeper may contract specially as a boarding-house keeper." *Story on Bailments*, 225. See note to *Manufacturing Co. v. Miller*, 21 L. R. A. 229; *Fisher v. Kelsey*, 121 U. S. 383.

<sup>9</sup> "The guest comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment received. The rule is not changed by the fact that the person remains a long time at the inn in this way." *Shoecraft v. Bailey*, 25 Iowa, 553; *Metsger v. Schnabel*, 23 Misc. (N. Y.) 698; *Pullman Car Co. v. Lowe*, 28 Neb. 239, 26 Am. St. Rep. 325; *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417. In *Lusk v. Be-*

*lote*, 22 Minn. 468, "a father who comes from another state wherein he resides and stays for a month with his family at a hotel in which the family is stopping is a traveler and can recover for the theft of his watch from the rooms occupied by himself and family at the hotel, where his purpose evidently was to make a flying visit to his family and a merely temporary stay in the city in which the inn was located." "In this case it was laid down that the father's status as a traveler, like any other status, was shown to exist, and is presumed to continue, and that neither the agreement by which he was to pay special rates for himself and family lower than those ordinarily charged for transient guests, nor the fact that he remained in the inn for a month, nor any other fact appearing in the case, furnished any evidence that his character was changed from that of a traveler to that of a boarder."

§ 338. **Personal presence of the guest.**—The personal presence of the guest at the hotel is not always necessary in order to hold the innkeeper liable as an innkeeper for his property which has been lost at the inn; as where his baggage was taken there in charge of his servants or a member of his family in a way that the law would imply that while there it is in his possession. This, no doubt is carrying the rule to its farthest limit, and it has been questioned whether it is the law. The inn or hotel is for the entertainment of the guest primarily, and the protection of his baggage or property which accompanies him is an incident to the entertainment, and it would seem that it is carrying the rule a little too far to say that an innkeeper could be made a bailee of the property of a person and subjected to the extraordinary liability of an innkeeper where the owner is not entertained as a guest at the hotel.<sup>7</sup> Some of the courts contending for the rule undertake to draw a distinction between a case where property intrusted to a bailee is lost by the bailee, and one

<sup>7</sup> In a very early case (*Towson v. Havre de Grace Bank*, 6 Harr. & Johns. (Md.) 47), one was intrusted with a sum of money by the bank to be passed in Baltimore for the benefit of the bank, or to be returned. The agent for the bank agreed to this undertaking, which was entirely for the accommodation of the bank. He proceeded to Baltimore, taking with him the money—the bank notes—and put up as a guest at the house of, the appellant, who was a common innkeeper in the city of Baltimore. His money was intrusted to the barkeeper of the inn for safe keeping, and through him was lost. The action was brought by the bank against the innkeeper. After reciting the facts the court say: "It is the profit, then, to the innkeeper which alone creates his liability, and it matters not out of whose funds the expenses of the guest are defrayed. It is enough that he receives the consideration

from whence his responsibility arises—the premium for his risk. Thus it is said in a case in Yelverton that 'if A. sends his money by his friend who is robbed in the inn at which he is a guest, A. shall have the action.' And there is no reason why it should not be so; the innkeeper being chargeable not on the ground that he entertains the owner of the money or other goods, but because he receives, no matter by whom paid, a compensation for the risk. The judgment in this case, therefore, ought to be affirmed." In *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188, it was held "the duties owed by an innkeeper as such are due only to his guests. To constitute one a guest it is not necessary that he be at the inn in person; it is enough that his property be there in the charge of his wife or servant, or agent who is there in his employment, or as a member of his family; but they must be there in such a way that the law

where the property intrusted to an agent is lost. None of the cases hold that in the former case the innkeeper would be subject to extraordinary liability.<sup>8</sup> The rule, however, seems to be well settled that if the property left with the innkeeper for safe-keeping is inanimate property and the person leaving it is not a guest, that is, a person at the hotel receiving entertainment, the innkeeper is not liable for its loss except as he may be liable as an ordinary bailee.

Leaving a horse and vehicle with which one is traveling at an inn has been held to constitute the owner a guest. But it seems that this was more generally the rule in times when persons traveled through the country by their own conveyance than it is at the present time. This rule will be found to be laid down more generally in the early English cases and in some of the earlier cases in this country. As, for example, in the case of *Mason v. Thompson*, 9 Pick. 280, the traveler never went to the inn, but stopped as a visitor with a friend and sent her horse and carriage to the inn. After four days she sent for the property and found that a part of it had been stolen, but still the innkeeper was held liable.<sup>9</sup>

**§ 339. The furnishing of what accommodations necessary.—**

It seems that one may become a guest although he does not receive or obtain all of the accommodations that the inn usually furnishes. As, for example, one may be entitled to all the privileges of a guest, and render the innkeeper liable as an innkeeper, who only obtains lodgings and takes his meals at some other place, or where he obtains meals and does not have lodging at the inn. If in such case he receives a portion of the accommodations as a transient he may be in all respects considered as a guest. In the case of *Lynar v. Mossope*,<sup>10</sup> the plaintiff went from a train on which he arrived to the defendant's hotel taking

will imply the property, while there, to be in his possession and not in the possession of the person who is there with it as his bailee."

<sup>8</sup> *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188. Mutually opposed to this case is the case of *Mason v. Thompson*, 9 Pick. (Mass.) 280. *McDaniels v. Robinson*, 28 Vt. 387, 67 Am. Dec. 720; *Pallin v. Reid*, 10

Ont. App. 63; *Strauss v. Hotel, etc. Co.*, 12 Q. B. D. 27; *Toub v. Schmidt*, 60 Hun (N. Y.), 409.

<sup>9</sup> *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574; *Russell v. Fagan*, 7 Houst. (Del.) 382; *York v. Grindstone*, 1 Salk. 388; 2 Lord Raymond, 866; *Walker v. Sharp*, 31 U. C. Q. B. 340.

<sup>10</sup> 36 U. C. Q. B. 230.

with him his baggage. He applied to the clerk of the hotel for a room, which he occupied for the purpose of dressing and making his toilet before visiting a friend. During the time there was sent to him hot water with which to shave. Occupying the room only for a short time, he left his baggage in the room and went to his friend. It was held that he was a guest during the time he was using the room for the purpose of dressing. Hotels that are kept on the European plan, where guests have no other accommodations except the accommodations of the rooms, are held to be subject to the law of innkeepers, and persons so occupying the rooms are guests.<sup>11</sup>

§ 340. *Mere visitors.*—Persons who merely visit the inn or hotel for the purpose of meeting friends, or dining with them, are not guests of the hotel; they may be transients, but they are not there for the purpose of obtaining the accommodations that the hotel usually and generally gives to its patrons. They are really guests of the person whom they visit, and not guests of the inn. In *Gastenhofer v. Clair*<sup>12</sup> the plaintiff claimed to have become a guest by reason of ordering and taking dinner while waiting for his uncle to arrive. The court say this put him in no different position from that he would have occupied had he sat down with the uncle, as he had been invited to do. He was there upon the invitation of that gentleman, and with no intent to sojourn at the hotel as a guest for even the briefest period.

It seems that the question is decided upon the motive with which one visits the inn, whether it is to use it for a very brief period or for the most trifling purpose as a public house. And it cannot be said that where one visits the hotel merely to call upon or visit a guest at the place and to incidentally enjoy the hospitality of the house, it was his intention to become a guest. He no more becomes a guest than he would if using the place by sitting in the parlors, or using the reading room or writing room, or visiting with companions about the office or sitting rooms. In

<sup>11</sup> *Burnstein v. Sweeney*, 33 N. Y. Sup. Ct. 271; *Bullock v. Adair*, 63 Ill. App. 30. "His taking food without lodging constitutes one a guest." *Read v. Amidon*, 41 Vt. 15, 98 Am. Dec. 560; *Orchard v. Bush*, 2 Q. B. 284, 78 L. T. (N. S.) 577. "One at an inn merely for the purpose of attending a ball was held not to be a guest." *Fitch*

*v. Casler*, 17 Hun (N. Y.), 126; *Carter v. Hobbs*, 12 Mich. 52. Judge Christiancy in rendering the opinion said: "The plaintiff was no more the guest of the inn than a person residing across the street and attending the ball on the same occasion."

<sup>12</sup> 10 Daly, 265.

such case it cannot be said that there is any intention upon the part of the visitor to become a guest at the inn, and there is no consideration or benefit derived by the innkeeper and no understanding that the person is a patron of the place.<sup>13</sup>

§ 341. *The length of time one remains, immaterial.*—The mere fact that one remains at the inn a long time or for only a short time is not of itself sufficient to determine the question as to whether he is a boarder or a guest. It is a question that must be determined, as we have said, from the fact as to whether he is a transient or whether he has settled down at the place intending to remain and become settled in the hotel as his home for the time, and it is often a difficult question to determine.<sup>14</sup>

§ 342. *The purpose for which one uses the inn.*—The guest must use the inn for legitimate purposes, and if one should go to the inn for the purpose of committing a crime, and is engaged in illegal pursuits, as, for example, burglarizing the rooms, he cannot be said to have the privileges of a guest. And so where one goes to the inn for immoral purposes, as where one went to a hotel with a disreputable woman, registered with her as husband and wife, was assigned a room and delivered some money to the clerk, who absconded therewith, it was held that he was not a guest and could not recover the money from the innkeeper.<sup>15</sup>

§ 343. *Who must the innkeeper receive as guests.*—The innkeeper may be said to be a *quasi*-public servant, keeping a public house where any one, with but few exceptions, has a right, on complying with certain regulations, to go and be received, and find the rest and entertainment usually furnished by the keeper of the inn. So it may be said that as a general rule an innkeeper is bound to receive and entertain, if he has room in his house, every one who applies to him for entertainment who is orderly and law-abiding and tenders the price, or is able and willing to pay the price of his entertainment. In *Bowlin v. Lyon*<sup>16</sup> the court say: "The grounds upon which these restrictions are im-

<sup>13</sup> *Bennett v. Melor*, 5 Term Rep. 273.

<sup>14</sup> See notes, *post*, § 343.

<sup>15</sup> *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242. The court, after stating the case, reaches the following conclusion: "That one whose status is a guest is a traveler or a transient comer who

puts up at an inn for a lawful purpose to receive its customary lodging and entertainment, and not one who takes a room solely to commit an offense against the laws of the state." See, in this connection, *Sula v. Omel*, 61 N. Y. S. 659.

<sup>16</sup> 67 Iowa, 563.



posed are, that persons engaged in this vocation are in some sense servants of the public, and in conducting their business they exercise a privilege conferred upon them by the public, and they have had secured to them by the law certain privileges and rights which are not enjoyed by the members of the public generally." And in a leading English case<sup>17</sup> it is said: "The innkeeper is not to select his guests; he has no right to say to one you shall come in to my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servant, they having in return a kind of privilege of entertaining travelers and supplying them with what they need. The innkeeper, in the very doing of his business, necessarily holds himself out to the public as a keeper of a public house, and he solicits all to come and patronize him and become guests of his inn." And so the inn from time immemorial has been considered to be a place where the traveler, or any person desiring the accommodation it afforded, may go and be cared for as a guest, and the keeper of the inn is not allowed to deny the right to any person who comes who is suitable and able and ready and willing to pay for the entertainment furnished. In *Markham v. Brown*<sup>18</sup> it is said: "An innkeeper holds out his house as a public place to which travelers may resort, and of

<sup>17</sup> *Rex v. Ivens*, 7 Car. & P. 213-219; *Hawthorne v. Hammond*, 1 Car. & K. 404-407. "In summing up this case, Parker, B., said there is no doubt that the law is that a person who keeps a public inn is bound to admit all persons who apply peaceably to be admitted as guests." *Atwater v. Sawyer*, 76 Me. 538. When persons unobjectionable enter a hotel not as guests but for pleasure or profit to be derived from intercourse with the inmates of the house, they are there not of right but under an implied license that the proprietor may revoke. *State v. Steele*, 106 N. C. 766, 8 L. R. A. 516, where is discussed the question and authorities cited.

<sup>18</sup> 8 N. H. 523-528,—Am. Dec. 209.

In *Watson v. Cross*, 2 Duv. (Ky.) 147, the court say: "The innkeeper was legally bound to receive and entertain all guests apparently responsible and of good conduct who might come to his house, and if he refused to do so he was liable alike to an indictment and an action by the party aggrieved; and the mere fact of infancy would not justify him in any such refusal. Where a party voluntarily contracts with an infant, then the infant may avail himself of his legal disability and avoid the contract, if not for necessities; but to apply the principle to contracts which are compulsory on the side of the other contracting party would be to make the law an instrument of oppression. It would be a legal

course surrenders some of the rights which he would otherwise have over it; holding it out as a place of accommodation for travelers, he cannot prohibit persons who come under that character, in a proper manner and at a suitable time, from entering, so long as he has the means of accommodation for them."

§ 344. **Limitations.**—To the rule which requires the innkeeper to receive all who apply to him for entertainment, who are willing and able to pay the price, there are certain limitations; and these limitations are not alone for the advantage of the innkeeper, but they are required as well for the comfort and safety of the guests, and therefore it is not only the privilege of the innkeeper to take advantage of these limitations, but it becomes his duty to do so, otherwise he might become liable to the guests of his inn in an action for damages. These limitations have already been foreshadowed, and perhaps more than indicated by what has been said upon the subject as to who the innkeeper must receive. Generally, they may be grouped under three heads:

1st. The innkeeper may refuse to receive one as a guest if unable to do so on account of his house, or inn, being filled and there is no further accommodations.

2d. He may refuse to receive disorderly persons, and if such a person has been received, or, if after having been received, he becomes disorderly, the innkeeper may require him to leave the house.

3d. He may refuse to receive persons who are infected with contagious diseases.

(1) As to the first limitation—refusing to receive a guest on account of the house being filled,—in almost every case it is not difficult to understand that these limitations could be taken advantage of by the innkeeper; but what would be his duty in extreme cases, or to what extent he would be bound to crowd the capacity of the house, is difficult to decide. As, for example, in case of severe storms, or in case of large crowds that have been gathered to the town or city where the hotel or inn is situated, what is the ability of the person turned away to obtain a place

absurdity to compel a man to make a contract and at the same time permit the other party, who is the instrument of such compulsion, to avoid it." An inn-

keeper is liable, at common law, to one whom he refuses the privileges of a guest. *Cornell v. Huber*, 92 N. Y. S. 434.

for lodging and entertainment? the physical condition of the person applying?—all these questions would seem to enter into the matter of deciding correctly the rights and liabilities of the innkeeper to turn away a person applying at his inn for shelter or food. No doubt the rule would be decided by the question of reasonableness under all the circumstances, coupled with the lack, of course, of any malice or design upon the part of the innkeeper.

(2) As to the second exception, the decision of the innkeeper cannot be based entirely upon his own rights and privileges, but he is bound to look after the care, comfort and safety of those who are guests at the inn. He is under obligation to those persons who have already entered the inn or the hotel, paid for their entertainment and are entitled to have furnished to them not only shelter and food, but also the privilege of enjoying the comforts usually furnished to guests of the place. The guest is not legally called upon to put up with the annoyance of drunken, indecent and vulgar associates who are carrying on their disorderly practices to the extent of making his stay disagreeable and unbearable. On the contrary, he may call upon the innkeeper to turn away such persons unless they desist from such practices. And so where a guest is assaulted by a drunken person and suffers by reason of such disorderly treatment, or where he has suffered from loss of property which has been stolen from him while in the inn, or from any other disorderly conduct on the part of persons who are accepted as guests, he would no doubt have an action against the innkeeper for the damage he might sustain.<sup>18a</sup>

(3) The third limitation mentioned, namely, the refusal to receive guests who are infected with contagious diseases, is based not only upon the privilege of the innkeeper to reject such persons, and upon the right which the guest has to be entertained without danger of being infected with contagious diseases, but it also rests upon public policy. The inn, as we have seen, is a public house kept for the entertainment and comfort of the public. It could hardly be said that under such circumstances the law would permit an innkeeper to receive persons into such a public place who would inoculate or infect guests who come to the place expecting to be entertained and protected as guests. In *Gilbert v. Hoffman*<sup>19</sup> the plaintiff claimed damages of the defendants, innkeepers, on account of having been wrongfully ex-

<sup>18a</sup> See *post*, § 349.

<sup>19</sup> 66 Iowa, 205.

posed to the small-pox at their hotel, whereby the plaintiff became sick, and was removed to a pest-house, where she suffered great bodily pain and mental anguish and was permanently disfigured. The court say: "By keeping their hotel open for business they (the innkeepers) in effect represented to all travelers that it was a reasonably safe place at which to stop; and they are hardly in a position now to insist that one who accepted and acted on this representation and was injured because of its untruth shall be precluded from recovering against them for the injury on the ground that she might by further inquiry have learned its falsity."

It is perhaps because of these limitations that it necessarily follows that an innkeeper may make reasonable rules and regulations which he may require the guests to observe, and, if they refuse to comply with these reasonable rules and regulations, may go to the extent of ejecting them from the house. But in the carrying out of the rules and regulations thus made, and in fact in taking advantage of the limitations which have been discussed, the innkeeper must exercise good judgment and reasonable care, or he may become liable for his treatment of or actions toward the guests in these respects.

§ 345. **Liability for refusing to receive a guest.**—Having discussed the general rules which define the duty of the innkeeper to receive all who may apply and his right to exercise the limitations which have also been mentioned, we have now to notice what his liability may be in refusing to receive a guest where legally and of right it is his duty to receive such person. It would be difficult, indeed, to classify the numerous cases which present themselves in contemplating this branch of the subject. It should be borne in mind that the rule which governs in like cases is, that where there is a duty imposed by law upon a person, with which he neglects or refuses to comply, and his neglect or refusal results in damage to another, he is liable to answer for such damage. Just how far this rule, however, can be carried has been somewhat interesting both to the law writers and to the courts. The supreme court of Pennsylvania in *McHugh v. Schlosser et al.*,<sup>20</sup> held that an inn-keeper was liable for

<sup>20</sup> 159 Pa. St. 480. This case is an unusual and interesting one and settles the principle discussed in the text, and perhaps is the only case that could be cited at

the present writing. It appears that Mary McHugh, the plaintiff, brought suit to recover damages for the loss of her husband, alleging that his death was caused by

the death of a person who, while sick, was by the innkeeper driven out into a storm without adequate covering, and left for the space of an hour in a stream of melting ice and snow, where he fell down from inability to stand on his feet, holding that it was reasonable to suppose that death might follow such sudden exposure in his condition. The courts have gone further than this in their rulings, and it has been held that an innkeeper might be liable to an indictment for turning away a guest from his inn when he had room and could have received him, and on account of it the guest suffered great bodily harm. In the case of *Rex v. Ivens* <sup>21</sup> it was held that an indictment lies against

the improper conduct of the innkeepers. McHugh, her deceased husband, came to the hotel of the defendants late at night, registered, was assigned to and paid for a room for the night, and retired. On the following day he complained of being ill and remained most of two days in bed; a physician was called, who prescribed for him. During the day he obtained several drinks, and during the forenoon of Monday he seemed bewildered, walked the halls on the floor on which his room was situated, and about the middle of the day the housekeeper reported to the proprietor that he was out of his room and was sitting, partially dressed, on the side of the bed in another room. The proprietor and his porter started in search of McHugh, and the proprietor seemed to have exhibited some excitement or anger. When found, and when the porter was leading him to his room, the proprietor said that he could not stay any longer, and on reaching the room the porter put his coat, hat and shoes on him, led him to the freight elevator, put him on it and let him down to the ground floor. He took him through a back room into the alley and led

him into the alley. Rain was falling and the day was cold. A stream of water and melting snow was running down the alley. McHugh was without overshoes, overcoat, or wraps of any description. When the porter was taking him down the alley he fell to the pavement. Soon after he was discovered, having raised up, leaning heavily against the wall of the hotel, but apparently unable to step, the porter behind him urging him forward. An officer found them in this situation, and at once sent for an ambulance; during the time, however, that he was going after the ambulance, the sick man laid in the snow and water. He was taken to the hospital, but when they arrived all signs of life had disappeared. In such case it was held that the defendants, the innkeepers, were liable in damages.

<sup>21</sup> 7 Car. & P. 578.

"Godson, for the defendant: Does your lordship think that an indictment lies against an innkeeper for refusing to receive a guest? I know that an action may be brought against him if he does so; and such an action was brought against an innkeeper at Lancaster a few years ago. This

an innkeeper who refuses to receive a guest, he having room in his house at the time; and that it is not necessary for the guest to tender the price of his entertainment if his rejection is not on that ground. And it is no defense for the innkeeper that

is only, at most, a private injury to Mr. Williams, and not an offense against the public.

"Coleridge, J.: There can be no doubt that this indictment is sustainable in point of law. Mr. Sergeant Hawkins distinctly lays it down that an indictment lies for this offense. . . .

"Coleridge, J. (in summing up): The facts in this case do not appear to be much in dispute; and though I do not recollect to have ever heard of such an indictment having been tried before, the law applicable to this case is this: that an indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travelers, and supplying them with what they want. It is said in the present case that Mr. Williams, the prosecutor, conducted himself improperly, and therefore ought not to have been admitted into the house of the defendant. It a person came to an inn drunk, or behaved in an in-

decent or improper manner, I am of opinion that the innkeeper is not bound to receive him. . . .

It is next said that he came to the inn at a late hour of the night, when probably the family were gone to bed. Have we not all knocked at inn doors at late hours of the night, and after the family have retired to rest, not for the purpose of annoyance, but to get the people up? In this case it further appears that the wife of the defendant has a conversation with the prosecutor, in which she insists in knowing his name and abode. I think that an innkeeper has no right to insist in knowing those particulars; and certainly you and I would think an innkeeper very impertinent who asked either the one or the other of any of us. However, the prosecutor gives his name and residence; and supposing that he did add the words 'and be damned to you,' is that a sufficient reason for keeping a man out of an inn who has traveled till midnight? I think that the prosecutor was not guilty of such misconduct as would entitle the defendant to shut him out of his house. It has been strongly objected against the prosecutor by Mr. Godson, that he had been traveling on a Sunday. To make that argument of no avail, it must be contended that traveling on a Sunday is illegal. It is not so, although it is what ought to be avoided whenever it can be. . . . With respect to the non-tender of money by the prosecutor, it is now a custom so

the guest was traveling on Sunday, and arrived at the inn after the innkeeper's family had gone to bed; nor is it any defense that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing these particulars; but if the guest come to the inn drunk, or behave in an indecent or improper manner, the innkeeper is not bound to receive him.

§ 346. **May refuse to receive or to entertain, when.**—From what has already been said, it follows that an innkeeper will be protected in refusing to admit certain persons into his inn, and, if they have once been admitted, in turning them out; or, in some cases, taking them to a place where they can be suitably and properly cared for; and this in all cases may not be considered simply as the right or privilege of the innkeeper, but his duty—a duty he owes to the other guests of his house, to whom he would be liable if he should refuse to so act. Some examples are noted in the following paragraphs. It would, however, be impossible to discuss every case which would fall within what has just been mentioned.

§ 347. **When a guest is taken ill with contagious disease.**—We have already noticed that the innkeeper would be liable to his guests if he received them within his inn where at the same time he was harboring a person afflicted with a contagious disease, without giving notice to the guests admitted. It therefore follows that he would have the right to rid his inn of such a person in order that he might carry on his business as an innkeeper. Where the person, however, has become ill with the contagious disease after having been admitted as a guest, the

universal with innkeepers to trust that a person will pay before he leaves an inn, that it cannot be necessary for a guest to tender money before he goes into an inn. . . . And the opinion which I have formed is, that the lateness of the hour is no excuse to the defendant for refusing to receive the prosecutor into his inn. Why are inns established? For the reception of travelers, who are often very far distant from their own homes. Now, at what time is it most essential that travelers should not be denied admission

into the inns? I should say when they are benighted, and when, from any casualty, or from the badness of the roads, they arrive at an inn at a very late hour. Indeed, in former times when the roads were much worse, and were much infested with robbers, a late hour of the night was the time, of all others, at which the traveler most required to be received into an inn. I think, therefore, that if the traveler conduct himself properly, the innkeeper is bound to admit him, at whatever hour of the night he may arrive."

duty of the innkeeper toward him, by way of removing him from the inn, is a very particular one. It has been held that he has the right to remove him, after notice, in a careful and becoming manner and at an appropriate hour, to a hospital or other place of safety, provided the life of the guest is not impaired thereby.<sup>23</sup> This right, however, to remove a guest would not apply to one who was afflicted with other illness than that which is contagious, even though the illness was a disturbance and an annoyance to the other guests. The innkeeper in such case would not be justified in removing him except in a manner suited to his condition.<sup>23</sup>

§ 348. **Disorderly conduct.**—For disorderly conduct the innkeeper may refuse to receive a guest, and it is his duty to not only refuse to receive him but even to expel him from his inn, if after having been received he becomes disorderly. This would apply to drunken and disorderly persons, as already noticed, and it has been held that it also applies to those who are in such a filthy condition as to annoy the guests of the place, for filthiness of person is disorderly.<sup>24</sup> But mere apprehension of insult is not sufficient reason for refusal.<sup>25</sup> An English case, however, has gone so far as to hold that a guest might be refused entertainment where his conduct was offensive to the other guests, in that he had been in the habit of coming into the inn with several large dogs which were annoying to those stopping at the inn, and where he persisted in bringing these animals into the inn notwithstanding the objections of the innkeeper.<sup>26</sup> From these examples and cases cited it will be noticed that there must necessarily rest with the innkeeper a very large discretion which he is required to exercise with reasonably careful judgment, and that each case must necessarily depend upon its own particular facts. It would be difficult, indeed, to lay down any fixed, settled rule which would in all cases determine the rights and duties of the innkeeper in receiving guests into his hotel, and in defining and stating his right to exclude them or refuse them further entertainment.

<sup>22</sup> *Levi v. Corey*, 1 City Ct. (N. Y.) Sup. 57.

<sup>23</sup> *McHugh v. Schlosser*, 159 Pa. St. 480, 39 Am. St. Rep. 699.

<sup>24</sup> *Markham v. Brown*, 8 N. H. 523.

<sup>25</sup> *Atwater v. Sawyer*, 76 Me. 539.

<sup>26</sup> *Reg. v. Reymer*, 2 Q. B. D. 136.



## CHAPTER III.

### LIABILITIES.

#### § 349. Innkeeper's liability.

- 350. The extraordinary liability on grounds of public policy.
- 351. Liability and exceptions analyzed.
- 352. Where the loss is occasioned by accidental fire and not in any way the result of fault or neglect of the innkeeper.
- 353. By act of God or the public enemy.
- 354. By irresistible force without negligence or fault on the part of the innkeeper.
- 355. forcible robbery, riots, etc. —Diligence.
- 356. If the loss is occasioned by force from within.
- 357. By reason of the inherent nature of the property.
- 358. Through the fault of the guest, his servants or companions.

#### § 359. Reasonable regulations of the inn.

- 360. For what property liable.
- 361. Must be a guest of the inn and the property within the inn.
- 362. — *Infra hospitium*.
- 363. — Lost by theft.
- 364. If a boarder, not a guest.
- 365. — Property of a third person.
- 366. Liable to corporation for loss of agent's goods.
- 367. Exception—Goods for sale or show.
- 368. Liability for the safety and protection of his guests.
- 369. Defective or unsound condition of the premises.
- 370. Injuries from fire.
- 371. Unsanitary condition of the inn and unwholesome food.
- 372. Limiting liability.
- 373. Innkeeper liable as ordinary bailee.
- 374. Liable as gratuitous bailee.

§ 349. Innkeeper's liability.—The innkeeper belongs to the exceptional class of bailments, and his liability, at common law, is in the nature of an insurer, but more or less variable depending very much upon the facts and subject matter of the particular case. Generally considered the subject of the innkeepers liability divides itself into two general classes or subheads; liability for the loss or injury of the property of the guest, and liability for the safety and protection of the guest while in the inn, each resting upon a somewhat different basis, occasioned largely by reasons of the duty of the guest to exercise a reason-

able degree of diligence, and by reason of the control of the innkeeper which is materially different as applied to the guest or his property. While the authorities generally accept the fact that the relation is that of an exceptional bailment and the liability more than ordinary, they are by no means in harmony as to the extent of the exceptional liability. As to the liability of the innkeeper for the loss or injury of the property of the guest, it has been said that there are three distinct classes of holdings.

(1) "That the innkeeper is *prima facie* liable for the loss of goods in his charge, but may discharge himself by showing that the goods were not lost by his negligence or default."

(2) "That the innkeeper is discharged by showing that the loss or injury was the result of inevitable accident or irresistible force, though not amounting to what the law denominates the act of God, and not attributable to the public enemy."

(3) "That the innkeeper is liable unless the loss was caused by the act of God or the public enemy, or by the fault, direct or implied, of the guest."<sup>1</sup>

<sup>1</sup> Sibley v. Aldrich, 33 N. H. 553-62. In this case the court has gathered together very many of the leading cases upon this subject at the time of its decision, and has discussed with great ability the English rules then extant, citing in the opinion Dawson v. Channey, 5 A. & E. (N. S.) 165, where it was held that when goods had been deposited in a public inn and there lost or injured, the presumption is that the loss or damage was caused by the negligence of the innkeeper or his servants, but that this presumption may be rebutted, and if the jury find in favor of the innkeeper as to negligence he is entitled to succeed on a plea of not guilty. And in Metcalf v. Hess, 14 Ill. 129, where it was held that the innkeeper might discharge himself by showing that the loss happened without any default on his

part. In Merrill v. Cleghorn, 23 Vt. 177, it was held that the innkeeper could not be held where the property was lost by fire, occasioned by inevitable or superior force and without any negligence on his part. And in Kesten v. Hildebrand, 9 B. Monr. 72, where it was held that the innkeeper "is not liable for a loss by external force or robbery, or if the loss occur by the neglect of the guest or his servants or companions." The court in the same case collects authorities to the point that the innkeeper cannot discharge himself by showing that the loss did not happen by his default, but that he must go further and show that it was caused by the default, direct or implied, of the owner; citing 2 Kent's Com. 574, where it was said: "An innkeeper, like a common carrier, is an insurer of the goods of his

One of the most extreme cases in this country and holding to the most extreme doctrine as to liability is that of *Hulett v. Swift*,<sup>2</sup> where the court of appeals in New York held that an innkeeper is an insurer. In that case the plaintiff's servants put up at the defendant's inn, the innkeeper taking charge of and stabling the plaintiff's horse, his wagon and a load of buckskin goods. The plaintiff in the court below obtained judgment for the full value of the property upon the ground that the defendant innkeeper was an insurer of the property of his guest placed in his custody. The court of appeals affirmed the case. Porter, J., in rendering the opinion of the court said: "An innkeeper is responsible for the safe-keeping of property committed to his custody by a guest. He is an insurer against loss, unless caused by the negligence or fraud of the guest, or by the act of God or the public enemy. This liability is recognized in the common law as existing by the ancient custom of the realm, and the judges in *Calye's Case* treated the recital in the special writ for its enforcement as controlling evidence of the nature and extent of the obligation imposed by law upon the innkeeper." The court in discussing the liability of innkeepers puts it upon the ground of public policy, saying that it had its origin in considerations of public policy; that it was essential to the interests of the realm; and that every facility should be furnished for securing convenient intercourse between different portions of the kingdom; holding that to all intents and purposes the same rules of liability apply to innkeepers that apply to common carriers, and that in the case of loss either the innkeeper or the guest must be the sufferer, and that the common

guests and can only limit his liability by express agreement or notice." And *Richmond v. Smith*, 8 B. & C. 9, where Lord Tenterden says: "It is clear that at common law when a traveler brings goods to an inn the landlord is responsible for them. In this respect I think the situation of the landlord was precisely analogous to that of the common carrier. Bailey, J., in the same case says: "It appears to me that an innkeeper's liability very closely resembles that of a common car-

rier." Also citing *Kent v. Shackford*, 2 B. & Ald. 803; *Mason v. Thompson*, 9 Pick. 280; *Shaw v. Berry*, 31 Me. 478, where it was held that to discharge an innkeeper from liability for the loss of the goods in his charge, it is not sufficient for him to show that the loss did not happen by his neglect or default, but that he must go further and show that it happened by the fault, direct or indirect, of the owner.

<sup>2</sup> 33 N. Y. 571.

law furnished the solution of the question on which of them it should properly fall, and quotes the following: "In *Cross v. Andrews*<sup>3</sup> the defendant, if he keep an inn, ought at his peril to keep safely his guest's goods;" and further remarking that "he must guard them against the incendiary, the burglar and the thief, and he is equally bound to respond for their loss, whether caused by his own negligence or by the depredations of knaves and marauders within or without the curtilage;" quoting also a long list of New York authorities that uphold this doctrine; also authorities from some of the other states.

It may be said that, following this case, the legislature of the state of New York saw fit to pass a law modifying the liability of the innkeeper.

The supreme court of Michigan in *Cutler v. Bonney*,<sup>4</sup> involving nearly the same state of facts, took a different and more liberal view of the law, and in the opinion discuss the case of *Hulett v. Swift*. In the Michigan case, plaintiff brought suit to recover the value of a certain horse, wagon and goods destroyed by fire in the barn of the defendant, an innkeeper. It was found by the court that the fire was not caused by the fault of defendant or his servants, and the question was as to the liability of the innkeeper to respond in damages for the loss to the guest. Campbell, J., rendered the opinion, and in the course of it used these words: "In order to hold a bailee liable for that which is in no respect to be imputed either to his own negligence, or to that of persons for whom he is responsible, there should be found clear authority. The common law has declared this liability against one class of bailees, and has made common carriers responsible for all losses not caused by the public enemies, or some casualty in no way arising out of human action. It is claimed by plaintiffs that in this respect common carriers and innkeepers stand on precisely the same footing; and it is not

<sup>3</sup> Croke's Eliz., 622. In the courts of New York it has been held in very many cases that the innkeeper, like the common carrier, is by common law an insurer. *Purvis v. Coleman*, 21 N. Y. 111-117; *Wells v. Steam Navigation Co.*, 2 Comst. 204; *Gile v. Libbey*, 36 Barb. 70; *Ingelsby v. Wood*, 36 Barb. 458; *Taylor v. Monnot*, 4

*Duer*, 117 Grinnell v. Cook, 3 Hill, 488; *Piper v. Manny*, 21 Wend. 282; 1 Pars. on Contracts, 623; *Shaw v. Perry*, 31 Me. 478; *Gilbert v. Aldrich*, 33 N. H. 533; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 427; *Mason v. Thompson*, 9 Pick. 280.

<sup>4</sup> 30 Mich. 259.

claimed that defendants can be made liable in the present case on any narrower ground. There are many cases in which it has been said by judges that the liability is not distinguishable. Most of these have been collected in the notes of Mr. Holmes to the last edition of Kent's Commentaries. 2 Kent, 596. But except in the decisions to be especially referred to hereafter, there is nothing in the facts of any authority which we have discovered which called for any such remark, or which would justify the enforcement of a liability for such a loss as the present. With one or two exceptions the cases referred to have arisen from thefts or unexplained losses of property, while it was within the legal custody or protection of the innkeeper. The rule actually applied in all these cases has been that all such losses were presumably due to the neglect of the innkeeper. Generally, and perhaps universally, he has been held to an absolute responsibility for all thefts from within, or unexplained, whether committed by guests, servants or strangers. But he has quite as uniformly been discharged by any negligence of the guest conducing to the injury, and he has not been held for acts done by the servants of guests, or by those whom they have admitted into their rooms, and in many cases has been held discharged where the guest has exercised any special control over his property. The general principle seems to be that the innkeeper guarantees the good conduct of all persons whom he admits under his roof, provided his guests are themselves guilty of no negligence to forfeit the guaranty. Beyond this we have found no decided case anywhere. We have found no decision holding innkeepers liable for losses by purely accidental casualties, or from riots, or acts of force from without, such as have been from the beginning excepted by the text-writers. These writers, or at least such of them as are of recognized authority, have drawn a line between carriers and innkeepers, resting on the distinction between absolute and qualified responsibility. And none of the accepted writers have found any authority for disregarding this distinction. The two classes of bailees have been kept carefully separate. . . . The common law has in some things been modified by decisions, but it is contrary to law to follow dicta made in cases calling for no departure from the old law. It would be a manifest innovation to create a liability where no possible default exists, and to sustain such an innovation there ought to be both reason and authority.

We cannot object to follow settled law on our own views of what policy ought to make it. But we are not prepared to assume there is any policy which will compel persons who are in no-wise in fault to respond in damages, where the law is not clear against them. And the authorities directly in point on losses by fire are not numerous, and do not, in our judgment, call for any such consequences. The doctrine imposing such a liability may be said to rest entirely on what was said by Justice Porter in *Hulett v. Swift*, 33 N. Y. 571, In that case the subject is discussed at some length and with much ability. But no foundation is shown there for the doctrine asserted, beyond remarks which are confessedly opposed to the text-books, and which were foreign to what was actually decided in the cases where they are found. The whole opinion of the learned judge is open to the same criticism, as he himself declares the point discussed did not really arise, inasmuch as no proof was introduced changing the presumption raised by law against the defendant. The opinion was not unanimous, and the dissent of Judge Denio would detract much from its force, even if it had been pertinent to the facts. Opposed to this is the case of *Merrill v. Claghorn*, 23 Vt. 177, in which Judge Redfield, delivering the opinion of the court, reached the conclusion that where there was no negligence there was no responsibility for loss by fire. This opinion is an able one, and was not given beyond the facts. It has been both approved and criticised, but no occasion has heretofore arisen to consider its correctness upon similar facts. *Vance v. Throckmorton*, 5 Bush (Ky.), 42, is to the same effect, but there, too, the decision might have rested on other grounds, and its authority is therefore diminished. We regard the decision in Vermont as reasonable, and as within the fair meaning of the common-law rule."

The liability of the innkeeper for personal injuries to the guest while in the inn is discussed in a subsequent section.<sup>5</sup>

§ 350. **The extraordinary liability on grounds of public policy.**—It was upon the ground of public policy that the Romans declared by prætor's edict that if ship-masters, innkeepers and stable-keepers did not restore what they had received to keep safe, he would give judgment against them. The reason assigned for this edict was that it was necessary to place confi-

<sup>5</sup> *Post*, § 368.

dence in such persons and to commit the custody of things to them, and unless the rule was thus established an opportunity would be afforded to them to combine with thieves against those who trusted them, whereas they now had an inducement to abstain from such combinations. There is no doubt that in the case of innkeepers public policy demands a very high degree of diligence. The guest who is a transient or traveler is not supposed to know of the surroundings in which he is placed; he puts himself entirely in the hands of the innkeeper or his servants; he depends upon him for the safe-keeping of himself and his property. At night he takes the room that is assigned him; he sleeps and depends upon the innkeeper to watch over him and his property; and because of this utter dependence the law says, and public policy demands, that the innkeeper shall exercise an extraordinary degree of diligence in the protection of the property approaching that of an insurer, and in protecting the guest from injury a diligence commensurate with reasonable care for his safety and comfort.\*

§ 351. **Liability and exceptions analyzed.**—From what has already been said, and from the authorities examined, it may be determined that the common-law liability of an innkeeper for the property of his guest is that of an insurer, modified, by the following exceptions:

(1) Where the loss is occasioned by accidental fire, and is not in any way the result of the fault or neglect of the innkeeper.

(2) By the act of God or the public enemy.

(3) By irresistible force, without negligence or fault of the innkeeper.

(4) By reason of the inherent nature of the property.

(5) Through the fault of the guest, his servants or companions.

§ 352. (1) **Where the loss is occasioned by accidental fire and not in any way the result of fault or neglect of the innkeeper.**—The authorities, as we have seen, are by no means harmonious upon this question, and it is somewhat difficult to say where the weight of authority is. Some jurisdictions have

\* In *Crapo v. Rockwell*, 94 N. Y. S. 1122, held that the innkeeper is an insurer of the property of his guest. *Oriental Hotel Ass'n v. Foust* (Tex. Civ. App.), 86 S.

W. 373. Submits question, was guest guilty of contributory negligence. *Jefferson Hotel Co. v. Warren*, 63 C. C. A. 193, 128 Fed. 565.

held that the innkeeper is an insurer of the property of the guest which is placed in his hands for safe-keeping during the time the guest remains in the inn, and that the innkeeper can only be excused when the loss of such property is occasioned by the act of God, the public enemy or the fault of the guest. There is, however, a long line of authority holding with the case of *Cutler v. Bonney*,<sup>7</sup> from which we have quoted, that where the loss was the result of an accidental fire and in no wise attributable to the negligence or fault of the innkeeper, he is not liable; and it would seem that the tendency of the courts is to hold to this doctrine and to enlarge the limitations of the rule fixing the liability of the innkeeper rather than to hold to the severity of it. In a case where it can be said that there was no fault or negligence on the part of the innkeeper, that the loss was purely and solely attributable to accidental fire, to hold the innkeeper liable would be to say that, for the fault or acts of other persons over whom he has no control whatever, he must answer in damages. It would seem that such a rule would have no foundation in principle, and only rests in arbitrary and unreasonable dicta. It can hardly be said that it is demanded by that rule of public policy that has imposed the extraordinary liability upon the innkeeper, for it is not the result of any fraud or collusion on his part. It was not brought about in order that he might gain by it; he is entirely without fault; and because of this it is without the reason of the rule, and therefore it should be without the rule. The more correct rule, it appears, would be that the innkeeper is bound to exercise extraordinary care,—care that would be in every way in keeping with the great and important responsibility devolving upon the innkeeper, having in view the fact that the guest has submitted to him the care of his property, and if loss occurs the innkeeper must suffer unless he can show that he is not only not guilty of negligence, but that he has exercised that extraordinary diligence which the particular case and his particular business demands.<sup>8</sup>

<sup>7</sup> 30 Mich. 259.

<sup>8</sup> Cases where innkeepers are held liable when loss was occasioned by accidental fire. *Pinkerton v. Woodward*, 33 Cal. 557; *Hay v. Pacific Imp. Co.*, 93 Cal. 53, held liable unless occasioned by an irresistible superhuman

cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he has brought into the inn. *Hulett v. Swift*, 33 N. Y. 571; *Shaw v. Berry*, 31 Me. 478; *Richmond v. Smith*, 8 Barn. & Cres. 10; *Sibley v. Aldrich*, 33 N. H. 553; *Mateer v.*



§ 353. (2) *By act of God or the public enemy.*—All the authorities concede that where the loss occurred by reason of the act of God or the public enemy, the innkeeper is excused from liability. To this there is no necessity of citing authorities;

Brown, 1 Cal. 228; Manning v. Wells, 9 Humph. 764; Thickstone v. Howard, 8 Blackf. 535; Mason v. Thompson, 9 Pick. 283; Berkshire Woolen Mills v. Proctor, 7 Cush. 427.

Cases holding that the innkeeper is not liable where the loss is not occasioned by any fault or negligence on his part: Laird v. Eichold, 10 Ind. 212, 71 Am. Dec. 323; Baker v. Dessaner, 49 Ind. 28; Hulbert v. Hartman, 79 Ill. App. 289; Johnston v. Richardson, 17 Ill. 302, 63 Am. Dec. 369 and a case often cited, Vance v. Throckmorton, 5 Bush (Ky.), 41, 96 Am. Dec. 327, 48 Am. Dec. 416; Cutler v. Bonney, 30 Mich. 257; Dunbar v. Day, 12 Neb. 596, 41 Am. Rep. 772; Howe Machine Co. v. Pease, 49 Vt. 477; Merritt v. Claghorn, 23 Vt. 177; Fisher v. Kelsey, 121 U. S. 383; Burnham v. Young, 72 Me. 273. In the case of McDaniells v. Robinson, 26 Vt. 316-335, the court say: "In regard to the general liability of an innkeeper it is surprising that the law should still be so indeterminate. But the cases are fewer and less decisive upon this important subject than might have been expected. Even the absurd dictum in Newton v. Trigg, 1 Showers, 269, where Eyre, J., says, 'they (innkeepers) may detain the person of the guest who eats,' has been constantly quoted to establish the existence of such a right in the landlord, and without much examination (although the point decided in the case is whether an

innkeeper may become a bankrupt), until the comparatively recent case of Sunbolf v. Alford, 3 M. & W. 247, where Lord Abinger says: 'I would be sorry to have it thought I entertain any doubt in this case, or require any authority to support the judgment I propose to give, that no such right to detain the person of the guest can be for a moment tolerated in a free country. So, too, we find numerous creditable judges, and some decisions, carrying the liability of an innkeeper to the full extent of a common carrier, and thus making him an insurer against all losses not caused by the act of God or the public enemy. But such is clearly not the general course of the decisions in Westminster Hall, and that extreme responsibility was expressly repudiated by this court. Merritt v. Claghorn, 23 Vt. 177. It is there held that an innkeeper is not liable for loss of goods of the guest by fire from without, the probable act of an incendiary, and without any fault or negligence on his part, or on the part of any inmate of the house. But we have never intimated that we were prepared to put the liability of an innkeeper upon the same ground as that of other bailees. On the contrary, we regard it as well settled that the liability of an innkeeper is more severe than that of any other bailee, with the single exception of common carriers." See also note to 26 Vt. 342.

the only question in such cases to be determined is, Was the force or act that caused the loss the act of God or the public enemy?

An act of God has been defined to be such inevitable accident as could not be prevented by human care, skill or foresight, but results from natural causes, such as lightning, tempests, floods and inundations.<sup>9</sup> The public enemy in this connection applies to enemies in time of war with foreign nations, or to pirates who are considered at war with all mankind, but it does not include robbers, thieves, rioters or insurgents, whatever be their violence. It has been held, however, that the Confederate forces during the time of the rebellion were public enemies.<sup>10</sup>

**§ 354. (3) By irresistible force without negligence or fault on the part of the innkeeper.**—The rule is established by the weight of authority, that where there is an absence of any fraud, negligence or fault on the part of the innkeeper, and the loss was occasioned by irresistible force from, without the inn, the innkeeper is not liable. The rulings upon this question have been gathered from the reasoning and opinions of courts in cases holding that the innkeeper is not liable, rather than cases where the question of liability is positively decided.

The good judgment of men, tempered with equal and exact justice, would, however, dictate such a rule, and it cannot be said to be at variance with the result of the more rigid rule that makes the innkeeper an insurer of the property of his guest, which law was said to rest in the demands of public policy. The reason for that rule was that there often existed collusion between the keeper of the inn and those who were robbers and thieves and members of marauding bands who pillaged and robbed the guests of the inn, the innkeeper being equally at fault, a *particeps criminis* with those who perpetrated the crime; and it was to correct this fault and to establish a high degree of diligence to punish the slightest negligence that the extremely rigid rule was adopted; but the reason for that rule does not exist in the conditions here stated, and there is no reason why, in a case where the innkeeper is in no wise at fault, and where

<sup>9</sup> Anderson's Law Dict.; McHenry v. Philadelphia R. Co., 4 Harr. (Del.) 441.

<sup>10</sup> Story on Ballments, sec. 526; Southern Express Co. v. Womack,

1 Heisk. 269; State v. Moore, 74 Mo. 418; League v. Rogan, 59 Tex. 434; Monongahela Ins. Co. v. Chester, 43 Pa. St. 493.

he is entirely helpless and cannot resist or oppose, where the force is actually and without question irresistible and from without the inn, that he should be held liable for the loss. Indeed, it can hardly be said, as we have already discovered, that the innkeeper was at any time considered an absolute insurer of the property of the guest. His liability could always be more or less limited, if not entirely removed, by proof of lack of fault or fraud or negligence on his part. The rule more correctly stated is that an innkeeper is bound to exercise extraordinary care; that his liability is approximately that of an insurer when the property of the guest is brought within the inn and expressly or by implication confided to his care.<sup>11</sup>

§ 355. **Forcible robbery, riots, etc.—Diligence.**—If the robbery or riot that causes the loss is irresistible and without fault or negligence on the part of the innkeeper or those in charge of the inn, it can be clearly said that he would be excused from liability. While this is undoubtedly true, it must be remembered, however, that before he can be excused he must show that he could not have avoided the loss if he had exercised a high degree of diligence; for if by such diligence he, or those under his control, could have avoided the loss, he would be liable. If, for example, the force was great and irresistible, and of such a nature that it could not have been repelled and the loss could not have been prevented, yet if it should appear that the innkeeper failed to lock the safe that contained the property placed in his hands by the guest for safe-keeping, or failed to guard the inn as usual and as high diligence on his part demanded, or failed to call to his assistance any aid that he might have called in to protect the property, he could not shield himself by simply saying that it would have made no difference—that the robbery would have occurred at all events; that the force was such that he could not have resisted it. He must, in order to be excused, show that he exercised extraordinary diligence; that he did everything possible to resist the force and avert the loss. But suppose he knew that his house was to be raided by robbers or rioters at a certain time, and by acting promptly he could have given notice to the police, and by so doing have thwarted the plans, or at least have impeded the progress, of the robbers or rioters. It would certainly be his duty to give such notice, and he would

<sup>11</sup> *Wessenger v. Taylor*, 1 Bush (Ky.), 275.

not be excused if he failed to do so, and to do whatever else he could do to avoid the accomplishment of the crime. He would be held to the very highest diligence in this respect, and to excuse himself from loss he would be obliged to show that he had exercised such diligence.<sup>12</sup>

§ 356. If the loss is occasioned by force from within.—If the loss occurred by reason of force from within the inn, whether from the servants or guests, a very different question is presented. The innkeeper, it is said, “guarantees the good conduct of all persons whom he admits under his roof,” whether they are servants or guests. He is not only under no obligation to receive persons as guests who will steal from or rob the guests of the house, but the law forbids that they shall be admitted by him either as guests or otherwise. The guests of the inn have the legal right to rely upon the innkeeper to protect them not only from the servants of the inn, over whom he has control, but also from the guests whom the innkeeper admits to the inn.<sup>13</sup> At first blush it would seem to be a hardship to hold the innkeeper to loss occurring by reason of larceny or robbery committed by guests who have been admitted within the inn, and who perhaps are unknown to the innkeeper, but public policy seems to demand that he shall insure his guests from loss by reason of the acts of his servants or the acts of his guests. It is the duty of the innkeeper to provide honest servants and keep honest inmates, and to exercise care and vigilance over all persons who may come into his house, whether as guests or otherwise. By the common law he is responsible not only for the acts of his servants and domestics, but also for the acts of his guests. The reason for this stringent rule has been well stated by Sir William Jones. He says: <sup>14</sup> “Rigorous as this rule may

<sup>12</sup> *Hulbert v. Hartman*, 79 Ill. App. 239.

<sup>13</sup> A hotel keeper is not relieved from liability for loss of a guest's property, including samples of goods taken from his room by a fellow-guest, admitted thereto by the chambermaid, merely because she had several times seen the two guests together in the room, or because, as the proprietor afterwards learned, the guest had au-

thorized his fellow-guest to sell goods from the samples, as it does not follow therefrom that he had given him authority to have access to the room. *Jacobs v. Haynes*, 35 N. Y. S. 120.

<sup>14</sup> *Jones on Bailments*, 95-96; *Jalie v. Cardinal et al.*, 35 Wis. 113-126. In *Cunningham v. Buckey*, 42 W. Va. 671, 35 L. R. A. 850, the court discusses the common-law liability in this respect. Citing

seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility to which the private consideration ought to yield. For travelers, who must be numerous in a rich and commercial country,

authorities, the court say: "By the common law of England an innkeeper is responsible for the loss of the goods or money of a traveler who is his guest, whenever the loss is not occasioned by the default of the traveler himself, the act of God or the queen's enemies. Saund. Neg. 212. 'An innkeeper, like a common carrier, is an insurer of the goods of his guests, and he can only limit his liability by express agreement or notice.' 2 Kent, Com. 594. 'The common law, as is well known, upon grounds of public policy, for the protection of travelers, imposes an extraordinary liability upon an innkeeper for the goods of his guests, though they have been lost without his fault.' 11 Am. & Eng. Enc. Law, p. 51. 'If an innkeeper fails to provide honest servants and honest inmates, according to the confidence reposed in him by the public, his negligence in that respect is highly culpable, and he ought to answer civilly for their acts, even if they should rob the guests who sleep in his chambers.' Jones. Bailments, 94-96. 'Generally, and perhaps universally, he has been held to an absolute responsibility for all thefts from within or unexplained, whether committed by guests, servants or strangers.' 'The general principle seems to be that the innkeeper guarantees the good conduct of all persons whom he admits under his roof, provided his guests are themselves guilty of no negligence to

forfeit the guaranty.' *Cutler v. Bonney*, 30 Mich. 259, 18 Am. Rep. 127. 'Proof of the loss by the guest while at the inn is presumptive evidence of negligence on the part of the innkeeper or of his domestics. It is the duty of the innkeeper to provide honest servants, and keep honest inmates, and to exercise care and vigilance over all persons who may come into his house, whether as guests or otherwise. By the common law he is responsible not only for the acts of his servants and domestics, but also for the acts of other guests.' *Jalie v. Cardinal*, 35 Wis. 118. 'Neither the length of time that a man remains at an inn, nor any agreement that he may make as to the price of board per day or per week, deprives him of his character as traveler and guest, provided he retains his status as a traveler in other respects.' *Ib.* There is no question that the plaintiff was a guest at the defendant's hotel, and that while there he was robbed in his room while asleep, from within the defendant's family, including his servants. That he had been drinking, was careless with his money, and trusted in the honesty of defendant's household, and refused the services of Mrs. Buckley as to the care of his money, will not excuse the defendant from the dishonesty of those admitted to his employment. It was his duty to surround himself with honest servants for the protection of the

are obliged to rely almost implicitly upon the good faith of innkeepers whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers, where the injured guest would seldom if ever obtain legal proof of such combination, or of their negligence if any actual fault had been committed by them."

§ 357. (4) **By reason of the inherent nature of the property.**—Where the loss occurs without the fault of the innkeeper and because of the inherent nature of the property, the innkeeper cannot be chargeable with it. As, where fruit perishes, or where animals die because of disease, or are injured on account of their vicious nature.<sup>15</sup> But should the animal not die or be lost from its own inherent nature, from disease or its vicious action, the innkeeper would be liable unless he could show that he was without fault or that it resulted from such cause as would excuse him.<sup>16</sup> In *Howe Machine Co. v. Pease*,<sup>17</sup> the court say: "Loss of goods or chattels put in charge of an innkeeper by a guest gives rise to a presumption of the innkeeper's negligence; but that presumption may be repelled, not only by proof that the loss occurred through inevitable casualty or superior force, but by proof that he was not negligent, or proof that the goods or chattels were of a certain perishable or changeable kind, which would give rise to a presumption that their loss occurred in due course and order of things."

§ 358. (5) **Through the fault of the guest, his servants or companions.**—This limitation of the innkeeper's liability is upon the theory that the guest is guilty of contributory negligence, or it might be because of the tortious conduct of the

public; and he cannot excuse himself from liability by showing that the servant was a stranger and hired on recommendation as to good character. He should have exercised care and vigilance over wandering servants admitted to his house, and see that they did not have the opportunity to steal from his guests." *Gile v. Libby*, 36 Barb. (N. Y.) 70; *Houser v. Tully*, 62 Pa. St. 92; *Walsh v. Porterfield*, 87 Pa. St. 376; *Fuller v. Coats*, 18 Ohio, 343; *Smith v. Willson*, 36 Minn. 334; *Spring v.*

*Hagar*, 145 Mass. 186; *Rockwell v. Proctor*, 39 Ga. 105.

<sup>15</sup> *Howe Machine Co. v. Pease*, 49 Vt. 477; *Metcalf v. Hess*, 14 Ill. 129.

<sup>16</sup> *Hill v. Owen*, 5 Blackf. (Ind.) 323. And an innkeeper was held liable for damage to a guest's horse by the horse of another guest, although the injury was occasioned without any negligence on the part of the innkeeper. *Sibley v. Aldrich*, 33 N. H. 553.

<sup>17</sup> 49 Vt. 477.

guest or the fault of his servants or companions. Just what such negligence is, that will excuse the innkeeper from liability, has been the subject of a great deal of discussion. In Michigan it has been held that the innkeeper's liability for the baggage of the guest is not diminished but rather increased by the fact that the guest had become so intoxicated at his bar as to be unable to take care of it himself.<sup>18</sup>

It has been frequently held that the mere fact of failure to lock or fasten the door of the room at night, as matter of law, is not such negligence on the part of the guest as will relieve the innkeeper from loss, but that this fact may be taken in connection with others as evidence of negligence for the jury to consider. The tendency, however, of the more modern cases is that failure to lock or bolt the door of a room at an inn, when there is a lock or bolt upon it, may of itself be given to the jury as negligence.<sup>19</sup> In *Swann v. Smith* <sup>20</sup> it was held: Where an inmate of a lodging-house leaves the door of his room unlocked, knowing that persons may enter the house and go to his room unnoticed, he cannot recover of the keeper of the house for

<sup>18</sup> *Rubenstein v. Cruikshanks*, 54 Mich. 199. "The fact that the guest is intoxicated or his door unlocked will not destroy the liability of an innkeeper for theft committed by his servants." *Cunningham v. Buckey*, 47 W. Va. 67.

<sup>19</sup> *Spring v. Hager*, 145 Mass. 186; *Spice v. Bacon*, 36 L. T. (N. S.) 196; *Herbert v. Markwell*, 45 L. T. (N. S.) 649. In the case of *Morgan v. Ravey*, 6 Hurl. & N. 265, 266, it is said that "witnesses were, however, called on the part of the defendants to prove that the plaintiff had told them he had not locked the door. It was admitted that he did not use the bolt. There was a notice posted up over the mantelpiece requesting all visitors to use the night bolt. The plaintiff admitted he saw it, but said he did not read beyond the words 'notice.' Chief

Baron Pollock, at *nisi prius*, left the question of negligence to the jury, but told them at the same time that the guest was not bound to lock his bedroom door." *McDaniels v. Robinson*, 26 Vt. 816; 11 Am. & Eng. Ency. 53. "Despite the divergency of the decisions in regard to the scope of the liability of the innkeeper, it has generally been held that he is absolutely liable for all thefts from within, or unexplained losses of property in his charge, but that he may be discharged from liability by any contributory negligence of the guest, his servants or companions, and in many cases he has been discharged when the guest exercised no special control over his property."

<sup>20</sup> 14 Daly, 114; *Smith v. Willson*, 36 Minn. 334; *Fuller v. Coats*, 18 Ohio St. 343.

property stolen from his room, being himself lacking in ordinary care. The question of negligence as applied to the guest of the hotel, as in every other case where negligence is depended upon as a defense, must depend entirely upon the circumstances and facts surrounding the particular occasion; as, for example, the place where it is said to have occurred would have a great deal to do in the matter of deciding whether what was done was negligence. In one place it might not be considered negligence not to lock the door of a lodging room, while in another, from the very surroundings of the place, it might be considered gross negligence. In *Smith v. Wilson*<sup>21</sup> it was held that "a guest of an inn who had on a belt containing \$500 while asleep in his room, the door of which could be opened by pulling a wire attached to the bolt from the outside, was not guilty of contributory negligence, the money having been stolen." And in *Becker v. Warner*<sup>22</sup> it was held a question for the jury to determine whether it was contributory negligence where the guest, who was intoxicated, left the window of his room on the ground floor open and the lights burning in the room and went to bed.

§ 359. Reasonable regulations of the inn.—There is no doubt that the innkeeper may limit his liability by requiring his guests to conform to certain reasonable regulations. These regulations must in this case, as in every case where they are used for the limiting of liability, be reasonable. This is generally done by posting them in the several rooms of the inn; but the mere fact of posting them in the rooms is not sufficient: it is necessary that they should come to the actual notice of the guest. Where reasonable regulations have been made, and the guest has had actual notice of them, he will be bound by them if it appears that by reason of his failure to comply with the regulations the loss occurred. For in such case it could be reasonably concluded that the loss was occasioned by the negligence of the guest.<sup>23</sup>

<sup>21</sup> 36 Minn. 234.

<sup>22</sup> 35 N. Y. S. 739.

<sup>23</sup> *Fuller v. Coats*, 18 Ohio St. 243; *Cashill v. Wright*, 6 Ell. & Bl. 391; *Purvis v. Coleman*, 21 N. Y. 111. "A notice posted in the room of an hotel directing guests to leave their valuables in the hotel vaults does not apply to mineral specimens in a guest's trunk."

*Brown Hotel Co. v. Burckhardt* (Colo.), 56 Pac. 188. Where a guest handed to the clerk of a hotel a box containing valuables, without directions to put it in the hotel safe, not compliance with regulations. *Horton v. Terminal Hotel Co.*, 114 Mo. App. 357, 89 S. W. 363. Where guest left quantity of jewelry in traveling bag



The guest is also liable for the negligence of his servants which results in loss or injury to the property, as well as the negligence of his companions, or persons whom he harbors, or persons over whom he has control while a guest at the inn.<sup>24</sup>

§ 360. **For what property liable.**—As a general rule an innkeeper is liable for all the goods, chattels and money of the guest that is brought within the inn; and the limitation that commonly applies to common carriers, which limits the property to that which is carried for the convenience of the passenger, does not apply in the case of an innkeeper,<sup>25</sup> but includes

checked in check room over night, not complying with notice, and it was stolen, held negligence and could not recover. *Elcox v. Hill*, 98 U. S. 218, L. Ed. 103, and notes.

<sup>24</sup> *Calye's Case*, 8 Coke, 32; *Walsh v. Porterfield*, 87 Pa. St. 376. "The conduct of the guest contributing to his loss, whether voluntary or negligent, is always a defense; and his failure to deposit valuables in a safe place provided by the landlord, after express notice so to do, and his neglect to make use of sufficient fastenings provided for the security of the room from which they were stolen, are evidence of contributory negligence." *Shultz v. Wall*, 134 Pa. St. 262; *Johnson v. Richardson*, 17 Ill. 302; *Kisten v. Hildebrandt*, 9 B. Mon. (Ky.) 74. In *Burbank v. Chapin*, 140 Mass. 123, it was held "that an innkeeper, in the absence of an express contract to the contrary, is liable for the loss by theft of the property of his guest, although the guest knowingly fails to comply with the reasonable regulations of the inn, if the loss is not attributable to the non-compliance with such regulations."

<sup>25</sup> *Berkshire Woolen Mills v. Proctor*, 7 Cush. 417; *Wilkins v. Earle*, 44 N. Y. 172. Some of the

states, however have held to the rule that the personal property for which the innkeeper is liable consists of such articles of necessity or personal convenience as are usually carried by passengers for their personal use. *Lassen & Whitaker v. Clark*, 37 Ga. 242. Maryland follows the same rule; and in *Pettigrew v. Barnham*, 11 Md. 434, it was held: "The innkeeper is liable without regard to actual fault or neglect on his part, but such liability is limited to what is considered baggage and does not extend to every article the guest may choose to carry with him; the term 'baggage' does not embrace merchandise or other valuables not designed for use or personal convenience on the journey. Held, further, that the innkeeper is not liable for silver knives, forks and spoons carried by the guest in his trunk, but is liable for personal ornaments or jewelry appropriate for a traveler's wardrobe." In *Tierber v. Burrows*, 27 Md. 130, it was held: "Innkeepers, in relation to the baggage of their guests, stand on the same footing as carriers of passengers." The great weight of authority, however, is as laid down in the text,—the liability held to extend to personalty

whatever property the guest may take within the inn while he is a guest. It has been held to include a peddler's stock of goods, and other property of an entirely different nature from that which a guest would carry for his convenience while traveling, as will be noticed in cases cited in the note. There has been no distinction made by the courts between money and goods of a guest in cases touching the liability of the innkeeper, and the responsibility of the innkeeper in respect to the money of his guest is not limited to such an amount as is necessary for the guest's traveling expenses.<sup>26</sup> The only exception, if indeed it is an exception, is where the guest obtains a room to be used distinctively for business purposes, as for displaying goods for sale or show; but even in such case the liability of an ordinary bailee attaches.<sup>27</sup>

§ 361. **Must be a guest of the inn and the property within the inn.**—Before the liability of the innkeeper attaches, however, it must clearly appear that the owner of the property which is injured or lost, and for which recovery is sought, is a guest, of the inn at the time of the loss, and that the property was *infra hospitium*. The facts necessary to be shown to prove that the person was a guest of the inn have already been discussed.<sup>28</sup>

of all kinds. *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; *Hulett v. Smith*, 33 N. Y. 571; *Houser v. Tully*, 62 Pa. St. 92; *Metcalf v. Hess*, 14 Ill. 129; *Hilton v. Adams*, 71 Me. 19; *Cohen v. Manuel*, 91 Me. 274; *Smith v. Wilson*, 36 Minn. 334; *Piper v. Manny*, 21 Wend. (N. Y.) 282, where plaintiff recovered for a tub of butter. And in *Sneider v. Geiss*, 1 Yeates (Pa.), 34, the recovery was for two hundred and thirty-one Spanish milled dollars. In *Hulett v. Smith*, 33 N. Y. 571, the recovery was for the plaintiff's horse and wagon and a load of buckskin goods; and in *Clute v. Wiggins*, 14 Johns. (N. Y.) 175, recovery was for certain bags of wheat and barley. In *Cohen v. Manuel*, 91 Me. 274, a peddler's stock of goods was held

to be within the rule of liability; and this was also held in *Rubenstein v. Cruikshanks*, 54 Mich. 199.

<sup>26</sup> *Smith v. Wilson*, 36 Minn. 334. See also cases cited in preceding note. In *Raines v. Maxwell House Co.*, 112 Tenn. 219, 2 Am. & Eng. Ann. Cas. 488, the court discussed the statute as to liability for jewelry. In the notes to this case many cases are cited as to the common-law liability of the innkeeper for watch and jewelry of guests. Among the cases cited are *Lanier v. Youngblood*, 73 Ala. 587; *Ramaley v. Leland*, 43 N. Y. 539; *Murchison v. Sergeant*, 69 Ga. 206; *Noble v. Milliken*, 77 Me. 359.

<sup>27</sup> See *post*, § 367.

<sup>28</sup> Innkeeper is not liable to one for loss of baggage delivered to

§ 362. — *Infra hospitium*.—When the goods of the guest may be said to be within the inn is a question of very great importance in this connection. Just when can it be said that the innkeeper has the goods in his possession as an innkeeper? In other words, Just when can it be said that his liability commences? When are the goods *infra hospitium*? It is not necessary that the guest shall himself bring his goods within the inn and deposit them with the innkeeper at the time of his arrival, or that he shall even have them in his possession at the time of his arrival at the inn; the innkeeper is liable whenever the property is placed either in his possession as an innkeeper, or whenever it is put in the custody or control of his servants, either within the inn or without and about the inn, if the property is taken possession of by those who are acting as the servants of the innkeeper and in compliance with his directions; or when the traveler arrives at the inn and places his baggage and property in the hands of the porter, whose business it is to take charge of the baggage of guests,—in such cases it is held to be within the inn and subjects the innkeeper to liability. The placing of the property in the hands of the servants and the agents of the innkeeper, who are authorized and expected to wait upon the guests and to care for their property, is placing it in the custody of the innkeeper himself. As, for example, where animals and vehicles, loads of grain, goods of peddlers, or other like property has been placed in the hands of the hostler at stables belonging to the inn, it has been frequently held that the property is *infra hospitium*, and if loss occurs for which the innkeeper cannot be legally excused, he is liable.<sup>29</sup> And it has

the porter of the inn by one who intends to stop at the inn, but who does not; nor is the innkeeper in such case liable as a gratuitous bailee. *Tulane Hotel Co. v. Holohan*, 112 Tenn. 214, 79 S. W. 113. It is a prerequisite to the liability that the relation of innkeeper and guest should have existed. See notes to case of *Tulane*, etc. *Co. v. Holohan*, 2 Am. & Eng. Ann. Cas. 345-47, where several cases are cited and commented on. But where one gives his checks for baggage to porter of hotel

sent to depot to solicit customers for the hotel, he becomes a guest of the hotel at that time and the innkeeper is liable for the loss of the baggage so received by the porter. *Coscary v. Nagle*, 83 Ga. 696, 6 L. R. A. 483.

<sup>29</sup> *Mason v. Thompson*, 9 Pick. (Mass.) 280; *Albian v. Presby*, 8 N. H. 408. This case, though an early one, collects many of the authorities on this subject. The court say: "The general principle that an innkeeper is bound to keep safely the goods of his guest

been held that where an hotel keeper sends his porter to the depot to solicit persons traveling to stop at the inn, and there takes charge of the baggage, the traveler becoming a guest of the hotel, the liability of the innkeeper for the baggage of the traveler begins on the delivery of the baggage to the porter.<sup>30</sup> And in *Williams v. Moore*<sup>31</sup> it is held that an hotel keeper to whom a guest delivers his baggage for the purpose of having his baggage brought to the hotel is responsible for the loss of such baggage through the negligence of an expressman to whom the checks are given for such purpose, although the baggage is never brought to the hotel. The retaining of money or valuables on his own person while a guest at the inn is not necessarily such an exclusive possession as would excuse the innkeeper from liability.<sup>32</sup> Nor will the liability of the innkeeper cease if the guest directs his goods to be kept in a certain part of the inn, or should order them taken to his room.<sup>33</sup> But if the guest should give such directions as to the care of the goods or property as would remove it from the custody or control of

which are in his custody *infra hospitium*, but that he shall answer for nothing without the inn, is well settled. There are exceptions where the loss is occasioned by the servants or companions of the guest, not necessary to be further noticed at this time." In *Clute v. Wiggins*, 14 Johns. 175, it was held, where a sleigh-load of grain was put by the guest into an outhouse appurtenant to the inn, where loads of that description were usually received, and the grain was stolen during the night, that the innkeeper was liable for the loss. Judge Story, referring to this case, says: "Where goods are delivered at the usual place for such goods at the inn, the innkeeper is chargeable with them, although not strictly within the inn." Story, Bailm. 480.

<sup>30</sup> In *Coscary v. Nagle*, 83 Ga. 696, it was held: "When a traveler arrives at a depot and is met by one who is a porter of an inn,

hotel, or house kept for the accommodation of transient guests, wayfarers and travelers, who indicates to the traveler a certain conveyance by which he can go to such place or not, and the traveler delivers to him his baggage or the check therefor, the traveler is thereby a guest of such inn, hotel or house, so far as to render the proprietor thereof liable for the safe-keeping or redelivery of the same; the liability of the proprietor commences from the time of the delivery of the baggage or check to the porter; all that the traveler must do is to assure himself that the person representing himself as such porter is in fact the porter of the house." *Dickinson v. Winchester*, 4 Cush. (Mass.) 114.

<sup>31</sup> 69 Ill. App. 618.

<sup>32</sup> *Jalie v. Cardinal*, 35 Wis. 118; *Smith v. Wilson*, 26 Minn. 234.

<sup>33</sup> *Fuller v. Coats*, 13 Ohio St. 433.

the innkeeper, as, for example, placing it in the hands of some other person for safe-keeping, in such case the innkeeper would be relieved of liability.<sup>84</sup>

§ 363. — **Lost by theft.**—Where the loss occurs by theft committed by the servants of the innkeeper, or by other guests, and without the fault of the guest sustaining the loss, his servants or companions, the innkeeper is liable. The rule is admirably stated in the case of *Houser v. Tella*.<sup>85</sup> The court say: "The liability of an innkeeper arises from the nature of his employment. He holds out a general invitation to travelers to come to his house and he receives a reward for his hospitality. The law in return imposes on him corresponding duties, one of which is to protect the property of those whom he receives as guests. He is bound to take all possible care of the goods, money and baggage of his guests deposited in his house, or intrusted to the care of his family or servants, and he is responsible for their acts as well as the acts of other guests. If the goods of the guest are damaged in the inn or are stolen from it by the servants or domestics, or by a stranger guest, he is bound to make restitution, for it is his duty to provide honest servants and to exercise an exact vigilance over all persons coming into his house as guests or otherwise. His responsibility extends to all his servants and domestics, and to all the goods and money of his guest which are placed within the inn, and he is bound in every event to pay for them if stolen, unless they were stolen by a servant or companion of the guest. In case of a loss by theft it is no excuse for the innkeeper that he was sick or absent from home at the time, for he is bound in such case to provide honest and faithful servants according to the confidence reposed in him by the public. . . . But though an innkeeper is liable on grounds of soundest policy and public convenience for whatever is deposited in his house by a guest, he is not responsible for the loss or embezzlement of his guest's money, where he does not deposit it on the security of the inn, but in-

<sup>84</sup> In *Houser v. Tella*, 62 Pa. St. 92, it was held "an innkeeper is not liable for the loss or embezzlement of his guest's money when he does not deposit it on the security of the inn but intrusts it to another guest or in-

mate in whom he reposes his confidence." *Sneider v. Geiss*, 1 Yeates (Pa.), 24.

<sup>85</sup> 62 Pa. St. 92-95; *Walsh v. Porterfield*, 87 Pa. St. 376; *Clute v. Wiggins*, 14 Johns. 175.

trusts it to another guest or inmate for safe-keeping, in whom he reposes his trust and confidence."<sup>26</sup>

§ 364. **If a boarder, not a guest.**—If the person who sustains the loss be merely a boarder and not a guest at the hotel, the extraordinary liability for loss does not attach. But in such case the liability for property lost by theft, or by any of the causes already discussed, rests upon the question of ordinary diligence rather than upon the exceptional liability, for the innkeeper is only a bailee for hire.<sup>27</sup> There are some cases that are not in harmony with this doctrine; but this seems to be the general rule.

§ 365. — **Property of a third person.**—The ownership of the property lost *infra hospitium* by the guest is not an essential to recovery. If the property of a principal is brought by his agent or servant while a guest within the inn as baggage, or for use in the business of the principal, and is lost under such circumstances as would ordinarily render the innkeeper liable, in such case the usual liability of an innkeeper attaches and the principal would have an action against him for such loss. In *Towson v. Havre de Grace Bank*<sup>28</sup> it was held "if a servant is robbed of his master's money or goods while a guest at an inn, the master may maintain an action against the innkeeper."

<sup>26</sup> *Sneider v. Geiss*, 1 Yeates, 35.

<sup>27</sup> A very full discussion of this question, as well as of the liability of the innkeeper to protect the property of the guest, may be found in the notes in the case of *Taylor v. Downey*, 104 Mich. 532, 29 L. R. A. 92. In England it has been held that the boarding-house keeper is liable as a hired bailee to take such care of the boarder's baggage as a prudent person would take of his own property under like circumstances. *Dansey v. Richardson*, 3 El. & Bl. 144, 148, 171. But in this case the court was divided as to whether a boarding-house keeper is liable for the negligence of his servants where the latter leaves a door ajar and thus facilitates the theft

of the goods. In a later case in England, *Holden v. Soulby*, 8 Com. B. (N. S.) 254, 264, 270, it was held that a lodging-house keeper was not responsible for the loss of certain property of a lodger who was about to quit, which had been stolen by a stranger, who in the absence of such lodger was permitted by the occupier of the house to enter the room for the purpose of viewing it. The supreme court of Tennessee in *Manning v. Wells*, 9 Humph. 746, held "that it is sufficient to give the boarder a remedy when he shall have proven the innkeeper has been guilty of gross negligence."

<sup>28</sup> 6 Harris & John. (Md.) 47, 14 Am. Dec. 254.

§ 366. **Liable to corporation for loss of agent's goods.**—And so it has been held that a corporation may sustain an action against the innkeeper for loss of its goods while in possession of its agent who is a guest at the inn. In *Berkshire Woolen Co. v. Proctor*<sup>39</sup> this question was fully considered. The court say: "Another ground of defense taken in behalf of the defendants is, that this action cannot be maintained because plaintiffs, being a corporation, were not and could not be in the nature of things the guest of the defendants; that an innkeeper is liable only for the goods of his guest, and that therefore the defendants are not liable for the money of the plaintiffs, as they were not actually or constructively the guests of the defendant. But this reasoning cannot prevail. R. was the defendant's guest, and he was the agent and servant of the plaintiffs, and the money which was lost, and for which this suit was brought, was the plaintiffs' money in the possession of R., delivered by the plaintiffs to him as their servant and agent, to be expended in their business. This action, therefore, can well be maintained upon the well-settled principle of law, that, if a servant is robbed of his master's money or goods, the master may maintain the action against the innkeeper in whose house the loss was sustained."<sup>40</sup>

The bailee who is a guest at the inn may recover for property lost while a guest, and this is the rule even if he is a gratuitous bailee and not liable to the general owner for the loss.

In *Chamberlain v. West*<sup>41</sup> an action was brought by a guest to recover the value of a diamond scarf-pin alleged to have been stolen from his room while a guest at the hotel. It was shown that the plaintiff was not the owner of the pin; that it had been loaned to him by a friend about ten years previously. The

<sup>39</sup> 7 Cush. 417-424.

<sup>40</sup> *Bedle v. Morris*, Yelv. 162; *Bennett v. Mellor*, 5 Ir. Rep. 273; *Mason v. Thompson*, 9 Pick. 280; *Grinnell v. Cook*, 3 Hill. 485; *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188-190.

<sup>41</sup> 37 Minn. 54; *Jellett v. St. Paul R. Co.*, 30 Minn. 265; *Russell v. Butterfield*, 21 Wend. (N. Y.) 300; *Mechanics' Bank v. Farmers' Bank*, 60 N. Y. 40. And to the

point that the bailee may maintain an action, though not responsible to the general owner for the loss, *Falkner v. Brown*, 13 Wend. 62; *Morgan v. Portland, etc. Co.*, 35 Me. 55; *Finn v. Western R. Co.*, 112 Mass. 524. So a father may recover loss of property stolen from his son while a guest at an inn. In *Epps v. Hinds*, 27 Miss. 657, 61 Am. Dec. 528, 529, it was said: "Where the

court, in its opinion, says: "Nothing is better settled than that, in actions for tort in the taking or conversion of personal property against a stranger to the title, a bailee, mortgagee or other special property man is entitled to recover full value, and must account to the general owner for the surplus recovered beyond the value of his own interest; but as against the general owner or one in privity with him, he can only recover the value of his special property."

§ 367. **Exception—Goods for sale or show.**—The extraordinary liability of an innkeeper applies where the guest is using the inn for his accommodation as a guest, and, as we have seen, attaches to property which he carries with him either for use or for pleasure, and is not limited in amount or value; but where a guest obtains a room to be used distinctively for business purposes, as for the displaying of goods for show or sale, the extraordinary liability of the innkeeper does not attach, and for the loss of such goods he is only liable as an ordinary bailee for ordinary negligence. In *Myers v. Cottrill*<sup>42</sup> the court say: "I think this is the true rule of law on the subject. If a person going into a hotel as a guest takes to his room not ordinary baggage, not those articles which generally accompany the traveler, but valuable merchandise such as watches and jewelry, and keeps them there for show and sale, and from time to time invites parties to his room to inspect and to purchase, unless there is some special circumstance in the case showing that the innkeeper assumes the responsibility as of ordinary baggage, as to such merchandise the special obligations imposed by the common law do not exist, and the guest, as to those goods, becomes their vendor and uses his room for the sale of merchandise and really changes the ordinary relations between innkeeper and guest. It is, we know as a matter of experience, impracticable for the landlord to notice and vouch for every person who goes into the room. The guest permits them to stay as long as he pleases and

son was merely invested with a discretion as to the expenditure of the money, the loss necessarily falls upon the party who was bound to furnish other means for the same purpose." *Dickinson v. Winchester*, 4 Cush. 114, 50 Am. Dec. 760, 761, 764. It was ruled

that clothing purchased by a father for a minor son belongs to the father, and that he may recover for its loss by an innkeeper or carrier, unless the son has been emancipated.

<sup>42</sup> 5 Biss. 465.



shows his goods and sells them to whomsoever he pleases. We must presume that it is not for that purpose that the innkeeper allows persons to come to his house and enter his rooms, and the fact that the vendor may sleep in the room we do not think changes the rule." And it was held in this case that if the plaintiff did use the room as a place for showing and selling his merchandise as such, the extraordinary liability of the innkeeper did not exist. And in *Carter v. Hobbs*<sup>43</sup> the court say: "So, if a person who is a guest have a room especially for the purpose of showing or selling his goods, he cannot hold the innkeeper to his liability strictly as such in respect to these goods."

**§ 368. Liability for the safety and protection of his guests.**—The doctrine of the liability of the innkeeper proceeds upon the theory that he has control of his house and of the property, servants and guests therein. He selects his own servants, and is responsible for their acts while performing their duties. To a certain extent he has control over his guests; he is not bound to receive all who apply; and the rules limiting the reception of guests are such as tend to exclude people who are not proper and fit persons to be harbored and kept at an inn, and who could not be trusted to demean themselves in an orderly manner. So that the innkeeper, in the exercise of sound discretion and good judgment, has the right to refuse to receive such persons as guests, limiting those to be received as guests to persons who are fit, law-abiding, and reputable.<sup>44</sup> Thus far the inn-

<sup>43</sup> 12 Mich. 52; *Burgess v. Clements*, 4 M. & S. 306; *Mowers v. Fethers*, 61 N. Y. 34, 19 Am. Rep. 244, 246; *Neal v. Wilcox*, 4 Jones L. (N. C.) 146, 67 Am. Dec. 266, 267; *Fisher v. Kelsey*, 121 U. S. 383; *Scheffer v. Corson* (S. Dak.), 58 N. W. 555. And in an early English case the same rule was laid down. "A landlord is not bound to furnish a shop to every guest who comes into his house; and if a guest takes exclusive possession of a room which he uses as a warehouse or shop, he discharges the landlord from his common-law liability." *Farnsworth v. Packwood*, 1 Starkie,

249; *Becker v. Haynes*, 29 Fed. 441; *Fisher v. Kelsey*, 121 U. S. 383, 30 L. Ed. 930.

<sup>44</sup> In *Markham v. Brown*, 3 N. H. 523, it was held that "an innkeeper is liable if his house is disorderly, and he cannot be held to wait until an affray is begun before he interposes, but may exclude common brawlers and any who come with intent to commit an assault or make an affray. So he may prohibit the entry of one whose misconduct in other particulars, or whose filthy condition, would subject his guests to annoyance." And it has been held an innkeeper may refuse to re-

keeper may choose; and it is for these reasons, and in the following out of the general theory fixing the liability of the innkeeper, that it may be said that the innkeeper is bound to exercise reasonable care in protecting the guest within his inn from personal injury while remaining at his house as his guest. His liability for the safety of his guest, is to be distinguished however from his liability for the safe keeping of the property of the guest, which is that of an insurer limited by certain exceptions heretofore mentioned.<sup>45</sup>

By the great weight of authority it is held that an innkeeper is not an insurer of the safety of the person of his guest; nor is he liable for injuries inflicted upon him, either by those received as guests or by the negligent or wilful acts of the servants of the inn, when he has exercised reasonable care to prevent it and is himself without fault. The rule generally accepted is that the innkeeper's obligations to protect and guard the safety of a guest is limited to the exercise of reasonable care for their safety, comfort, and entertainment. What reasonable care is, is a question of fact for the jury, to be determined by the facts and circumstances of each particular case. It would be at least that care which an ordinarily prudent and careful innkeeper would exercise for the safety and comfort of his guests under just such circumstances.<sup>46</sup>

ceive a disorderly guest, or require him to leave his house. He is not bound to examine into the reasonableness of the guest's requirements. In *Atwater v. Sawyer*, 76 Me. 539, it was held that "mere apprehension of insult is no excuse for an innkeeper's refusal to receive a person as guest, without circumstances and facts justifying such apprehension."

<sup>45</sup> *Ante*, § 351.

<sup>46</sup> An interesting discussion of the liability of the innkeeper for injury of the guest by the servants of the inn was had in the case of *Clancy v. Barker*. The question was first involved and decided by the supreme court of the state of Nebraska. *Clancy v.*

*Barker* (Neb. 1905), 69 L. R. A. 642, 103 N. W. 446, where the court held that the innkeeper impliedly undertakes that his guest shall be treated with due consideration for his safety and comfort, and that the act of a servant resulting in injury to the guest, obviously amounts to a breach of contract, contending that the liability of the innkeeper for injuries inflicted by his servants upon his guests, is the same as the liability of the common carrier for the safety of his passengers in such like cases. With the report of the case in 69 L. R. A. 642, numerous cases are cited and quoted from in the notes and briefs of counsel. The same questions in a case upon the same

**§ 369. Defective or unsound condition of the premises.**—It is the duty of the innkeeper to exercise ordinary care in keeping the premises in such condition that the guest may be safe while within the inn and using it in the ordinary manner. This is upon the theory that the innkeeper extends an implied invi-

facts are discussed and decided by the United States circuit court of appeals for the eighth circuit. *Clancy v. Barker*, 66 C. C. A. 469, 131 Fed. 161, 69 L. R. A. 658, where the court took a somewhat different view of the question of liability and laid down the doctrine of the text, holding that the liability was not the same as the liability of a common carrier. Among other things the court say: "The general rule of law governing the liability of innkeepers . . . the rule which has received the approval of every court which had ever decided the question, so far as we have been able to discover, was that an innkeeper was not an insurer of the safety of the person of his guest against injury, but that his obligation was limited to the exercise of reasonable care for the safety, comfort and entertainment of his visitors." *Weeks v. McNulty*, 101 Tenn. 499, 43 L. R. A. 185, 70 Am. St. Rep. 693, 48 S. W. 309; *Sheffer v. Willoughby*, 163 Ill. 518, 521, 522, 34 L. R. A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; *Gilbert v. Hoffman*, 66 Iowa, 206, 55 Am. Rep. 263, 23 N. W. 632; *Stanley v. Bircher*, 78 Mo. 245. The court then discusses the liability of the carriers of passengers in such cases, and then points out the distinguishing features of the two cases, showing a "marked difference in the character of the contracts of carriage on a railroad or steamboat and of entertainment

at an inn, and a wide difference in the relation of the parties to these contracts. In the former the carrier takes, and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties, is the performance of the contract of carriage. For the time being all other occupations are subordinate to the transportation. The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how and where he shall ride, eat and sleep, while the passenger submits to the rules, regulations and directions of the carrier, and is transported in the manner the latter directs. . . ." The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, . . . is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination. . . . The innkeeper does not take nor does the guest surrender the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief occupation of the parties, but it is subordinate to the ordinary business

tation to all to come to his house and be entertained; and he is therefore liable for injuries sustained in consequence of the bad condition of the premises. And so if a guest should be injured by reason of a defective elevator; or by reason of want of ordinarily skillful management of the same;<sup>47</sup> or, as has been held, if the guest should be injured by the falling of a ceiling in the inn, which was due to the negligence of the innkeeper in keeping the same in repairs,—in all such cases the guest would have an action against the innkeeper, based upon want of ordinary care. There is, however, this limitation: "The general duty of an innkeeper to take proper care for the safety of his guest does not extend to every room in his house at all hours of the night or day, but must be limited to those places into which guests may be reasonably supposed to be likely to go in a reasonable belief that they are entitled or invited to do so."<sup>48</sup>

or pleasure of the guest. . . . The natural and logical result of this relation of the parties is that when the servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing their master's contract, and he is not liable for their negligent or wilful acts." The dissenting opinion by Judge Thayer is a strong argument for a different rule, contending that the same liability obtains as in cases against carriers of passengers. In *Rahmel v. Lehdorff*, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, it was held, that an innkeeper in the absence of negligence on his part, is not liable for injuries to a guest caused by an assault committed by a servant employed in the inn; the court saying: "An innkeeper is no doubt guilty of negligence if he admits to his hotel, or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities, who will probably assault or otherwise mal-

treat his guests; and for the consequence of such negligence he may be liable in damages." *Acton v. Reed*, 93 N. Y. S. 911. In *Block v. Sherry*, 87 N. Y. S. 160, it was held that whether spilling a glass of water on a guest by a waiter is negligence, depends upon the circumstances of the case.

<sup>47</sup> In *Scott v. Churchill*, 15 Misc. (N. Y.) 80, affirmed in 157 N. Y. 692, it was held that "a guest at a hotel is entitled to recover for injuries caused by the fall of a passenger-elevator, if the hotel-keeper was chargeable with negligence in allowing the elevator to become unsafe. And so it becomes the duty of the proprietor of an hotel or apartment house to guard the shaft so that persons shall not be injured by falling or stumbling into it." *Atkinson v. Abraham*, 45 Hun, 238; *Dawson v. Sloan*, 100 N. Y. 620, 19 Ill. App. 571, 152 Mass. 513.

<sup>48</sup> *Walker v. Midland R. Co.*, 55 L. T. (N. S.) 489; *Oxford v. Prior*, 14 W. R. 611; *Sandys v. Florence*,

§ 370. **Injuries from fire.**—The liability of the innkeeper for injuries to guests occasioned by fire rests upon the proof of negligence upon the part of the innkeeper. If it can be shown that the innkeeper was not guilty of negligence, and that by exercising ordinary diligence the injury could not have been averted, in such case at common law there would be no liability. In some of the states, however, statutes have been passed requiring innkeepers to provide fire-escapes. If an injury was occasioned by reason of the failure of the innkeeper to comply with the statute, he would be liable; but even where such statutes exist, if it should be shown that the guest who was injured could not have effected an escape or averted the injury by the use of the fire-escape, then the mere fact that there was no fire-escape provided would not be sufficient to fix the liability upon the innkeeper, if there was no want of ordinary diligence upon his part. In other words, it would be necessary to show that the injury occurred in consequence of the want of a fire-escape.<sup>49</sup>

§ 371. **Unsanitary condition of the inn and unwholesome food.**—Upon the same principle it is the duty of the innkeeper to exercise at least ordinary diligence in keeping the hotel in a sanitary condition. He holds out to the public impliedly, by inviting them to his inn, that they will be entertained in a place that is fit for the purpose for which it is kept. Where, therefore, one by reason of the unsanitary condition of the hotel contracts a disease, or where by reason of the condition of the hotel he is subjected to some contagious disease, in such case the innkeeper would be liable. And the same obligation rests upon him with reference to food. It is his duty to furnish to the guests wholesome food; and where, by reason of the unwholesomeness of food, guests are injured, a liability attaches to the innkeeper and an action can be sustained.<sup>50</sup>

§ 372. **Limiting liability.**—There seems to be no reason why the innkeeper cannot expressly or impliedly contract to limit

47 L. J. C. P. 598; Stanley v. Biercher, 78 Mo. 245; Ten Brock v. Wells, 47 Fed. 690.

<sup>49</sup> Weeks v. McNulty, 101 Tenn. 495.

<sup>50</sup> Sheffer v. Willoughby, 163 Ill. 518, 54 Am. St. Rep. 483. Where an innkeeper, with knowledge of the prevalence of smallpox in his

hotel, permitted a person to become a guest without informing her of the presence of the disease, it was held that the innkeeper would be liable to the guest if she contracted the disease while in the house, and was herself guilty of no negligence contributing to the injury.

his liability for the loss of the property of his guest, as it is entirely a question of property rights in which the public can have no interest, and public policy would not oppose it if the limitation did not go to the extent of excusing gross negligence; for as a general rule, no matter to what extent the limitation is attempted, the liability will be that of an ordinary bailee.<sup>51</sup> The innkeeper can no doubt by a regulation require his guests to deposit their valuable articles in a safe or vault provided by him, and this regulation may be brought home to the guest by notice; but, as has already been stated, such notice must be brought to the personal attention of the guest.<sup>52</sup> In most of the states, however, this matter is regulated by statute. The duties and the liabilities of the innkeeper are fixed, as well as the duty of the guest.

**§ 373. Innkeeper liable as ordinary bailee.**—Where the extraordinary liability of an innkeeper does not attach for the loss of the goods of the guest, the innkeeper may be liable as an ordinary bailee. As, for example, where the goods of the guest are kept for show or sale, or where goods are held by the innkeeper for charges after the guest has departed, or for goods and baggage of a regular boarder, as we have already seen,<sup>53</sup> or for the goods of a guest who has paid his bill and left the hotel, leaving his baggage in charge of the innkeeper, for a reasonable length of time the innkeeper is held to be liable as an ordinary bailee.<sup>54</sup>

<sup>51</sup> *Pinkerton v. Woodward*, 33 Cal. 547.

<sup>52</sup> Where a guest is notified that he must deposit his baggage in a particular place for safe-keeping and he neglects to do so, the innkeeper is not responsible in case of loss. *Wilson v. Halpin*, 1 Daly (N. Y.), 496. General notice, however, is not sufficient. *Stanton v. Leland*, 4 E. D. Smith (N. Y.) 88. The notice must be brought home to the guest. The fact that it was posted on the door of the guest's room is not sufficient to raise a presumption that he had knowledge thereof. *Bodwell v. Bragg*, 29 Iowa, 232. And where

an agreement that the innkeeper shall not be responsible for the loss of valuables unless deposited in the safe is printed upon the register heading, and the guest signs the register, it is held not to constitute a contract, or to be binding upon the guest, in the absence of proof that he saw it and assented to it. *Bernstein v. Sweeney*, 33 N. Y. Sup. Ct. 271. See *ante*, § 359.

<sup>53</sup> *Fisher v. Kelsey*, 121 U. S. 383, 16 Fed. R. 71-74; *Carter v. Hobbs*, 12 Mich. 52; *Mowers v. Fethers*, 61 N. Y. 34, 19 Am. Rep. 244, 247.

<sup>54</sup> *Adams v. Clem*, 41 Ga. 65;

§ 374. **Liable as gratuitous bailee.**—For goods deposited with the innkeeper for safe-keeping but without recompense, as where baggage is left by one not a guest at the hotel, the innkeeper, deriving no benefit, is a gratuitous bailee and liable only as such; and the same rule would apply where the goods of a departed guest had been left with the innkeeper for an unreasonable length of time, and in such case the innkeeper would be liable only for gross negligence.<sup>55</sup>

*Giles v. Fountleroy*, 13 Md. 126. In *Murray v. Marshall*, 9 Colo. 482, it was said: "Departing guests not infrequently leave baggage in care of the innkeeper for a few hours or a few days, to be called for or to be forwarded to some designated destination. The great increase of modern travel creates an increased demand for more extensive accommodations in this respect. With a view of influencing travelers in selecting their hotels, innkeepers more or less generally respond to this demand and provide increased accommodations and assume voluntarily duties respecting the baggage of the guest is thus left in their charge. In such case, if the liability of the innkeeper is that of voluntary bailee without compensation, guests are left with little or no protection. The case shows a tendency to enlarge it. And so in this case it was held that when a guest on leaving an hotel without the intention of re-

turning as a guest, fails to pay his bill, but returns within forty-eight hours to get his valise, the innkeeper was bound to ordinary diligence, and the loss of the valise raised the presumption of negligence."

<sup>55</sup> Where the innkeeper was liable only as a gratuitous bailee, it was held error to refuse to charge the jury that he was bound to take such care of the property as the most inattentive and thoughtless person would take of his own property. *Horton v. Terminal, etc. Co.*, 114 Mo. App. 357, 89 S. W. 363. Where one gave his baggage to the porter of a hotel at the station intending to become a guest at the hotel, but did not, held innkeeper not liable as a gratuitous bailee, for the reason the porter had no authority to create that relation. *Tulane Hotel Co. v. Hollahan*, 112 Tenn. 214, 2 Am. & Eng. Ann. Cas. 345, and notes.

## CHAPTER IV.

### COMPENSATION AND LIEN OF THE INNKEEPER.

#### § 375. Compensation—Lien.

376. The lien a common-law lien.

377. Amount of compensation.

378. If the guest an infant.

379. The property of third persons.

380. Same subject.

381. The guest a servant, agent or bailee of the owner.

§ 382. Where the property is animate.

383. Where the guest has wrongfully possessed himself of the property.

384. The lien of the inn-keeper fixed by statute.

385. The lien lost or waived.

386. Cannot be revived.

387. Boarding-house keeper.

§ 375. **Compensation—Lien.**—The innkeeper is bound to receive all who apply at his inn for entertainment, subject to certain limitations already discussed, and is liable if he fails to exercise that high degree of diligence; in some cases the liability even approaching that of an insurer, as we have seen. For this entertainment and care he is entitled to compensation, which he may demand in advance if he chooses to do so — a compensation limited only by reasonableness in amount. The payment of this is secured to the innkeeper by a lien on the baggage or property of the guest brought within the inn,<sup>1</sup> the lien being a general lien upon the property *infra hospitium*, attaching not only to property within the hotel, but to animals and property in the stables or barns of the innkeeper; and not only for the keep of the guest, but for the keep of the animals or property, and for any extras, as for wine or entertainment given by the guest to his friends. And this lien is not limited to the property of the guest *infra hospitium* not exempt from execution; such exempt property is subject to the innkeeper's lien;<sup>2</sup> and so is the prop-

<sup>1</sup> *Rosenplaenter v. Roessle*, 54 N. Y. 262; *Manning v. Hollenbeck*, 27 Wis. 202; *Proctor v. Nicholson*, 7 Car. & Pay. 67; *Turrell v. Crawley*, 13 Q. B. 197; *Alvord v. Davenport*, 43 Vt. 30.

<sup>2</sup> *Swan v. Bourne*, 47 Iowa, 501,

29 Am. Dec. 492. But it has been held that a lien cannot attach to horses carrying United States mail. *United States v. Braney*, 2 Wheel. C. C. 513. But see *Young v. Kimball*, 23 Pa. St. 193. It is now generally held that the lien



erty of an infant guest if brought within the inn and into the legal custody of the innkeeper;<sup>3</sup> and so also is the property of a married woman for her keep, care and entertainment while a guest.

In England it has been held that the separate property of a married woman would become subject to the lien of the landlord where credit was given to the husband to make payments on account; the balance of the innkeeper's bill not being paid. In that case the innkeeper was allowed to detain the wife's luggage notwithstanding it was the separate property of the wife.<sup>4</sup>

§ 376. **The lien a common-law lien.**—The lien is a common-law lien upon all the property brought within the inn by the guest and in the custody of the innkeeper. There is no limitation except by statute, and the statutes do not generally limit, but more often enlarge, the scope of the lien. The laws exempting property from levy and sale on execution are special limitations upon the general execution and are only inoperative to the extent of such limitation; and so in the case in question, if there are no special limitations by statute, the common-law lien would attach to all the property of the guest, as we have said.<sup>5</sup>

§ 377. **Amount of compensation.**—The amount of compensation the innkeeper is entitled to receive and charge and which will be secured by his lien, as a general rule, may be said to be whatever, under all the circumstances of the case and the general usage of the business in the locality where the inn or hotel is situated, would be considered reasonable; and this amount includes the reasonable charges for the lawful entertainment of friends of the guest who have been invited by him to the inn for entertainment, as well as the wine, cigars, and extras which he may order for said entertainment, or which he may have had while a guest at the hotel.

§ 378. **If the guest an infant.**—If the guest is an infant, it would seem on general principles governing the law of dealings with infants, that there might be some limitation upon this gen-

is a general one and attaches to all of the property brought by the guest to the hotel. *Milliner v. Florence*, L. R. 3 Q. B. Div. 484. But does not attach to the person or clothing of the guest. *Sunbolt v. Alvord*, 3 Mees. & W. 248.

<sup>3</sup> *Watson v. Cross*, 2 Duv. (Ky.) 147.

<sup>4</sup> *Gordon v. Silver*, 59 L. J. Q. B. 507, 25 Q. B. Div. 491, 63 L. T. (N. S.) 283.

<sup>5</sup> *Swan v. Bourne*, 47 Iowa, 501.

eral rule as to the amount for which charges could be made by the innkeeper and the lien attach to the property of the infant for the amount. Generally, as is well understood, an infant is liable for necessities and for benefits in certain cases; but to say that wine suppers and extravagant extras are necessities might be an enlargement of the rule of law, to say the least, if not an utter violation of the principle.

In *Proctor v. Nicholson*\* it is said: "The landlord of an inn may supply whatever things the guest orders, and the guest is bound to pay for them, provided the guest be possessed of his reason and is not an infant. In either of these latter cases the landlord must look to himself." The question, however, as to what are necessities is more or less uncertain and difficult of determination; it is a question for the jury, to be determined under all the circumstances of the case under the direction of the court.

§ 379. **The property of third persons.**—The English rule seems to have been followed by the courts in some instances, though it would seem not to have been very wisely reasoned out. This rule is, that because of the exceptional liability of the innkeeper, approaching almost that of an insurer of the goods brought within the inn by the guest, and because the law makes it incumbent upon him to receive the goods of the traveler or guest, that therefore he may have a lien for his compensation upon whatever goods or property is brought by the guest into the inn and placed in the custody of the innkeeper, without reference to the question of ownership; and, indeed, the courts have gone so far as to hold that the innkeeper may even have a lien upon the property brought within the inn by the guest, although it be property stolen by the guest, if the innkeeper has no knowledge of that fact and receives it into his custody on the faith of the innkeeping relation.

The most vigorous discussion and contention for this English rule may be found in the case of *Robins & Co. v. Gray*.<sup>7</sup> In that case the court say: "I have no doubt about this case. I protest against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries. The duties, liabilities and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or

\* 7 Car. & P. 67.

<sup>7</sup> L. R. 2 Q. B. Div. (1895), 501, 503.

contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveler comes to an inn with goods which are his luggage—I do not say his personal luggage, but his luggage,—the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveler but not his luggage. If the traveler brought something exceptional which is not luggage—such as a tiger or a package of dynamite,—the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveler and his goods. He has not to inquire whether the goods are the property of the person who brings them or of some other person. If he does so inquire, the traveler may refuse to tell him, and may say, ‘what business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them in;’ or he may say, ‘they are not my property, but I bring them here as my luggage, and I insist upon your taking them in;’ and then the innkeeper is bound by law to take them in. Again, suppose the things brought are such things as the innkeeper is not bound to take in; he may, as I have said, refuse to take them in although the traveler demands that they shall be taken in as his luggage; but if after that the innkeeper changes his mind and does take them in, then they are in the same position as goods properly offered to the innkeeper according to the custom of the realm. Then the innkeeper’s liability is not that of a bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for not keeping them safely unless they are lost by the fault of the traveler himself. That is a tremendous liability; it is a liability fixed upon the innkeeper by the fact that he has taken the goods in; and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveler. By law that lien can be enforced, not only against the person who has brought the goods into the inn, but against the real and true owner of them. That has been the law for two or three hundred years; but to-day

some expressions used by judges, and some questions — immaterial, as it seems to me — which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn, he may refuse to take them in; or, if he does take them in, he has no lien upon them. One cannot help asking, What is his liability supposed to be if he does take in goods under such circumstances? It must be borne in mind that goods brought into an inn are not exclusively in the possession of the innkeeper; the person who brings them may deal with them; he may take them out of a box in a room or passage without the knowledge of the innkeeper, though the latter is bound to see that no one else interferes with them. Now, is there any decided case in which it has been held that, although goods have been brought to an inn as the luggage of the traveler and received as such by the innkeeper, he has no lien upon them if he knows that they are not the goods of the traveler? There is not one such case to be found in the books.”

In the case of *Gordon v. Silver*<sup>\*</sup> the court say: “By the common law of England every person who keeps a common inn is under an obligation to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him. The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be used and made liable in damages if he fails in this respect. As a compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title. It seems, therefore, that the lien is commensurate with the obligation to receive the guest and to keep safely and securely his goods. The right of lien of an innkeeper depends upon the fact that the goods came into his possession in his character of innkeeper, as belonging to a guest.”

Other English cases might be cited; and there seems to be no variation as to the holding of the English courts. American courts have also followed the English rule.

<sup>\*</sup>L. R. 25 Q. B. (1890), 491, 492.

In an early case, *Grinnell v. Cook*,<sup>9</sup> a New York case, the court say: "The innkeeper is bound to receive and entertain travelers and is answerable for the goods of the guest, although they may be stolen or otherwise lost without any fault on his part. Like a common carrier he is insurer of the property, and nothing but the act of God or the public enemy would excuse a loss. On account of this extraordinary liability the law gives the innkeeper a lien upon the goods of the guests for the satisfaction of his reasonable charges. It was once held that he might detain the person of the guest, but that doctrine is now exploded, and the lien is confined to the goods. The inquiry then is whether the plaintiff received and kept the horses as an innkeeper. In other words, was he bound to receive and take care of them, and would he have been answerable for the loss if the horses had been stolen without any negligence on his part? The lien and the liability must stand or fall together. Innkeepers cannot claim the one with any just expectation of escaping the other."

And in a Minnesota case, *Singer Mfg. Co. v. Miller*,<sup>10</sup> it seems to have been conceded by counsel without argument that this is the prevailing rule. The court say: "The plaintiff's counsel does not seriously contest the proposition that an innkeeper may have such lien on the goods in the possession of his guest *infra hospitium*, though they belong to a third person, provided the innkeeper has no notice of that fact. If the innkeeper's liability would attach in case the sewing-machine was lost or stolen, it would seem but just to hold that his lien attaches whenever there is a corresponding liability."

The supreme court of Wisconsin, without opposition of counsel, seems to concede the English rule, but in the case cited the property was lawfully in the possession of the guest as the agent and traveling salesman of the owner.<sup>11</sup>

<sup>9</sup> 3 Hill (N. Y.), 485, 488.

<sup>10</sup> 52 Minn. 516, 518, 21 L. R. A. 229, and note, where authorities are collected.

<sup>11</sup> *Manning v. Hollenbeck*, 27 Wis. 202. A most extreme case may be found in *Black v. Brennan*, 5 Dana (Ky.), 311, where the court held that property brought

within the inn by a guest, which he had stolen, would be subject to the innkeeper's lien, even though claimed by the true owner; and in that case the court allowed the property to be sold and the amount received to be applied upon the innkeeper's claim.

In Oregon, the court, in *Cook v. Kane*,<sup>12</sup> declare this to be the common-law rule; that it is not restricted to the ordinary baggage or luggage of the guest. The court say: "Whatever controversy may exist in the judicial mind as to the true measure of the innkeeper's responsibility, it cannot be denied that his liability for the loss of the goods of his guest is extraordinary and exceptional. Compelled to afford entertainment to whomsoever may apply and behave with decency, the law as an indemnity for the extraordinary liabilities which it imposes has clothed the innkeeper with extraordinary privileges. It gives him as a security for unpaid charges a lien upon the property of his guest, and upon the goods put by the guest into his possession. Nor is the lien confined to property only owned by the guest, but it will attach to the property of third persons for whom the guest is bailee, provided only he received the property on the faith of the innkeeping relation. But the lien will not attach if the innkeeper knew the property taken in his custody was not owned by his guest, nor had any right to deposit it as bailee or otherwise, except, perhaps, some proper charge incurred against the specific chattels."

In this case, however, there seems to be some comfort and good reasoning in the dissenting opinion by Judge Thayer, who, at page 491, says: "Upon the main question in the case there is some doubt in view of the authorities upon the subject, though upon a common-sense view there would not seem to be any. That the man could pledge the appellant's property for his own hotel bill, or in any way subject it to the payment thereof, would shock all sense of property right. Respondent's counsel, however, have cited numerous cases where such a lien has attached to the property of a third person, and I have no doubt that such lien will in many cases attach to the property taken by the guest to the inn at which he obtains accommodation, though he is not the owner of it. But in such cases it seems to me the property must derive some special benefit or else the owner must have intrusted it to a party under circumstances from which he could reasonably have concluded that the party would become the guest of an inn and take the property with him there as his own, and I do not think the rule should extend further

<sup>12</sup> 13 Oreg. 482.

than this." And in *Domestic Sewing Machine Co. v. Watters*<sup>13</sup> the court has broken away from this English rule and based an opinion somewhat upon reason, holding that the innkeeper has no lien on the goods in possession of his guest as against the true owner, unless there be charges upon the specific article on which the lien is claimed.

§ 380. —. The further consideration of the cases and the law of the subject logically divides itself into three distinct classes, namely:

(1) Where the guest in possession of the property is the servant, agent, or bailee of the owner.

(2) Where the property in possession of the guest is animate.

(3) Where the guest in possession of the property is a wrongdoer in respect to it, having obtained possession of it without the consent of the owner — a trespasser or a thief.

§ 381. *The guest a servant, agent, or bailee of the owner.*—Where the guest is a servant, agent, or bailee of the owner of the property, and engaged in the business of the owner—as, for example, a traveling salesman,—and carries the goods into the inn, and in the course of the business of his principal the property is in the care and custody of the innkeeper in his inn-keeping relation, his right to have the lien attach to secure his compensation would seem to rest upon good legal reasoning; for if the guest is a servant of the owner, and the relation of innkeeper and guest is created at a time when the servant is engaged in the service of the owner, or at a time when a bailee is pursuing the object of the bailment for the benefit of the owner, the owner knowing the facts in such cases, it might be said that the owner impliedly consented that his property should be subjected to the lien of the innkeeper in case his compensation was not paid, for such a situation might be well said to be an incident to the relation into which the owner has entered. Very many of the cases involve such a state of facts.<sup>14</sup>

<sup>13</sup> 50 Ga. 573; *Wycoff v. Southern Hotel Co.*, 24 Mo. App. 382.

<sup>14</sup> In *Werthelmer, etc., Co. v. Hotel Stevens Co.*, 38 Wash. 409, 3 Am. & Eng. Ann. Cas. 625, the right of the innkeeper to lien upon samples of a third party in possession of traveling salesman is considered. And in a note in 3

Am. & Eng. Ann. Cas. a number of cases are collected holding that the innkeeper has a common-law lien upon the goods of the guest brought to his inn for board and lodging furnished, although the goods may be the property of another. Citing *Polk v. Melenbacher*, 136 Mich. 611; *Singer*

§ 382. Where the property is animate.—There is greater reason, perhaps, for giving to the innkeeper a lien upon animate property, such as horses or other animals, which are taken to the inn by the agent or servant of the owner in the transaction of and in the course of business for the owner and left with the innkeeper in his innkeeping relation; for in such case the subject of the lien must have its keeping and care, and there is a direct benefit derived therefrom by the owner of the property, and the lien would no doubt attach.

§ 383. Where the guest has wrongfully possessed himself of the property.—But where the guest has wrongfully possessed himself of the property, it would do violence to every principle of the rights of ownership of property to allow a lien to attach for the keep and entertainment of the guest at the inn, or for keep of the property whether animate or inanimate. As, for example, in case of stolen property, how can it be said that, consistently with the rights of ownership of property, a thief can steal and carry away the property of another, and although he has no title whatever that can be asserted against the rightful owner, yet he can by taking it to a hotel, and himself becoming a guest and failing to pay the compensation due the hotel keeper, confer upon the innkeeper a lien upon the property paramount to that of the absolute owner? Such a doctrine would violate

*Mfg. Co. v. Miller*, 52 Minn. 576. And under a statute in Iowa all property, even if known to be samples not belonging to traveler. *Brown Shoe Co. v. Hunt*, 103 Iowa, 586. And in Ga. *Domestic, etc. Co. v. Walters*, 50 Ga. 573.

The case of *Robins & Co. v. Gray*, L. R. (1895), 2 Q. B. Div. 501, was one of a commercial traveler employed by a firm who dealt in sewing machines. He stopped at the inn, and while there machines were sent to him by his employers, and in the ordinary course of business, for the purpose of selling them to customers in the neighborhood. Before the goods were so sent the innkeeper had express notice that

they were the property of the employer, but he received them as baggage of the traveler, who subsequently left them in the inn without paying his bill for board and lodging. So in the case of *Manning v. Hollenbeck*, 27 Wis. 202. This was a case of a commercial traveler, a guest at the inn, and the property was a trunk of samples belonging to his principal. *R. L. Polk Co. v. Melbecker*, 136 Mich. 611, 99 N. W. 867; *Cook v. Kane*, 13 Or. 482, 57 Am. R. 28, 11 Pac. 226. On a piano bought on credit, stipulating title to remain in vendor. *Horace Waters & Co. v. Gerard*, 94 N. Y. S. 702.



every principle of right and justice and the laws governing the title to property.

X What becomes of that legal right which protects every man in the enjoyment of his own — that he may retake it wherever he may find it if he has been feloniously deprived of it? It is hardly an answer to say that because the innkeeper is by law compelled to receive a guest who comes to his inn, if he is a proper person and he has room and can take care of his baggage and property brought within the inn, that he is entitled to a lien upon the property he brings into the inn; for in this case it would be paramount to holding that he is entitled because of this to deprive a legal owner of his title to property which has been stolen by the guest. In connection with this contention it should be remembered that the innkeeper is not compelled to receive a guest and render service to him as an innkeeper and depend upon receiving compensation therefor when the guest shall leave his house; he may insist upon his legal right that the guest pay for the entertainment in advance. So it is not a case where the innkeeper's only relief is his right to a lien upon the property which the guest brings into the inn. In discussing this matter it would seem that a number of the courts have blindly followed the earlier English cases, without discussing the reason of the rule which they adopted; but adopting it rather by way of following adjudicated cases than by the exercise of good judgment.<sup>15</sup>

When we stop to consider that builded into that great fundamental law of the land, the constitution, is the assurance to every citizen that he shall not be deprived of his property without "due process of law," and that this bulwark of right cannot be set aside, altered or changed, either generally or specially, by courts or executive officers, or by legislatures, the rule under discussion and contended for by some of the English courts would seem to be utterly antagonistic to the rights of property vouchsafed to every American citizen. We are therefore, because of these observations, constrained to say that the law in this country will not give to the innkeeper a lien for his compensation upon the property of third persons brought by the guest into the inn, except there exists a relation between the guest and owner like that of master and servant, principal and

<sup>15</sup> Domestic, etc. Co. v. Watters, 50 Ga. 573.

agent, or possibly bailor and bailee, and that at the time the guest be engaged in the use of the property in the carrying out of the particular relation; and that this applies as well to animate as inanimate property.

We are aware that this English rule has been quite largely adopted by the courts of this country, but it seems to us that the arguments and reasoning of the court in arriving at a conclusion that even property which has been stolen and taken to an inn by a guest can be subjected to a lien of a landlord is not in accord with our American system; it certainly must be held to run counter to that provision of the constitution to which we have already called attention.

The court of appeals in the state of Missouri have written somewhat vigorously upon this proposition. The opinion is by Mr. Justice Thompson. He says: "Nor are we prepared to agree with those courts which have found a plain principle of justice in a rule of law by which one man's property is confiscated to pay another man's debts. It is, to say the least, doubtful whether the extraordinary liability which the common law imposed upon the innkeeper in respect of goods brought to his inn by his guest furnishes a good reason for such a rule. It is also doubtful whether such a rule is not in conflict with the spirit of those guaranties of the right of private property which are embodied in American constitutions. It would be beyond the power of the legislature to pass a law under which the property of one man should be arbitrarily taken from him and given to another man. If the legislature could not pass such a law, we are not prepared to sanction a course of reasoning by which the conclusion is arrived at that the legislature intended to preserve such a rule of the common law, by enacting a statute, the terms of which, read in accordance with their sense, import the contrary. Again, the liability of a common carrier at common law is precisely that of an innkeeper. He is liable for the loss or damage of the goods committed to him for carriage happening from every other cause except the act of God or the public enemy. Both the liability of the carrier and that of the innkeeper were grounded at common law upon what was called the 'custom of the realm.' They were co-extensive with each other, had their origin in the same source, and rested upon the same consideration of public policy. And yet modern American courts have not hesitated to declare that a common carrier has

no lien for the carriage of goods, which he has innocently received from a wrong-doer, without the consent of the owner, express or implied. Upon the whole, we are satisfied that the lien of an hotel or innkeeper does not exist in this state in such a case as the present."<sup>16</sup>

§ 384. **The lien of the innkeeper fixed by statute.**—In almost all of the states the lien of the hotel keeper upon the goods and property of the guest for his compensation is fixed and regulated by statute, and by statute the procedure for foreclosing the lien is also provided. At common law the innkeeper could not sell the property and thus realize the amount of his compensation except by a proceeding in chancery, but now the statutes of the states generally provide for a sale from which an amount may be realized to satisfy the expenses of the sale, the amount of compensation due the innkeeper, if sufficient is obtained, and the balance, if any, be returned to the owner.

§ 385. **The lien lost or waived.**—The lien of the innkeeper may be lost or waived in the several ways already discussed.<sup>17</sup>

(1) By a tender to the innkeeper of his proper charges.

(2) By the innkeeper, upon demand of the property, placing his refusal to deliver it upon some other grounds than that of the non-payment of his compensation and his lien upon the goods.<sup>18</sup>

(3) By an agreement to give credit to the guest, because such an agreement would be inconsistent with the enforcement of a lien.<sup>19</sup>

In *Stoddard Mfg. Co. v. Huntley*<sup>20</sup> the court say: "The operation of a lien is to place the property in pledge for the payment of the debt; and where the party agrees to give time for payment, or agrees to receive payment in a particular mode inconsistent with the existence of such a pledge, it is evidence, if nothing appears to the contrary, that he did not intend to rely upon the pledge of the goods in relation to which the debt arose to secure the payment."

<sup>16</sup> Wyckoff v. Southern Hotel Co., 24 Mo. App. 382; Fitch v. Newberry, 1 Doug. (Mich.) 1; Robinson v. Baker, 5 Cush. 137; Stevens v. Boston & W. R. Corp., 8 Gray, 262; Clark v. Lowell, etc. R. Co., 9 Gray, 231.

<sup>17</sup> Ante, § 72.

<sup>18</sup> Hamilton v. McNulty, 145 Mass. 20.

<sup>19</sup> McMasters v. Merrick, 41 Mich. 505.

<sup>20</sup> 8 N. H. 441.

(4) By delivery of the goods to a third party with an agreement that the lien is to continue. This would discharge the lien unless the third party is under the control of the innkeeper. If such party were his servant or his agent in the transaction of the particular business, and in such case it would not be a release of the possession of the property and the lien would not be waived; but if it were a person over whom the innkeeper had no control, it would be a waiver of the lien. Possession is essential to the existence of the lien, and when it is voluntarily surrendered the lien must necessarily fail.

(5) A wrongful sale or pledge by the innkeeper would destroy the lien, but a lien acquired by a partnership would not be lost by a dissolution of the partnership and an assignment of the interest of one of the partners to the other.

§ 386. **Cannot be revived.**—If the innkeeper once parts with the possession of the property voluntarily, or loses or waives the lien in any of the ways we have noticed, the lien cannot be revived by again assuming possession of it, unless he has been deprived of the lien by fraud or misrepresentation of the guest and has repossessed himself of the property before there are any intervening rights, as that of innocent purchasers, mortgagees or assignees.<sup>21</sup>

§ 387. **Boarding-house keeper.**—The right of lien is not extended to boarding-house keepers. There are, however, statutes in force in many of the states which confer upon boarding-house keepers right which are substantially the same as the rights of innkeepers.<sup>22</sup>

<sup>21</sup> Robinson v. Larree, 63 Me. 116; Manning v. Hollenbeck, 27 Wis. 202; Hickman v. Thomas, 16 Ala. 666.

<sup>22</sup> Pollett v. Landis, 36 Iowa,

651; Hursh v. Buyers, 29 Mo. 469; Cross v. Wilkins, 43 N. H. 332; Nichols v. Holliday, 27 Wis. 406; Mills v. Shirley, 110 Mass. 158.



## PART FOURTH

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### POSTOFFICE DEPARTMENT

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#### CHAPTER I.

##### POSTAL SERVICE.

§ 388. Liability of postoffice department.  
389. Postmasters.

§ 390. — Liability.  
391. Carriers of mail.

§ 388. **Liability of postoffice department.**—One of the exceptional bailments recognized by the law is that of receiving, carrying and delivering the mail. The mail service of the country is intrusted to the postoffice department of the government; it is under its general supervision and control; and while in the performance of the duties connected with the mail service, not only letters and packages that may be properly denominated as mail matter, but large quantities of merchandise, are received and carried. But it can hardly be said that the relation of a common carrier of goods exists; it is more in the nature of a bailment for hire. While there is a small sum paid for the carriage by way of postage, it is not an amount paid for the services, nor considered as adequate or reasonable, but rather an amount paid to the government to aid and support the whole system of postal service; it is a dealing with the government whose agencies are employed to do the particular service.

While the postoffice department in a way is responsible for the services and the property carried, it cannot be sued by the owner of the mail package, even if it were lost, or failed to be delivered, because it is a department of the government that is engaged in the service and cannot be sued without its consent. It is the government itself that undertakes the carrying of the mail through its agents and servants, and any misconduct or failure of performance of duty on its part must be corrected by

an investigation of that department carried on by the government or its representatives.

§ 389. **Postmasters.**—Postmasters, their assistants and clerks, appointed and sworn as required by law, are public officers through whom the service of receiving and forwarding the mails is more directly carried on; for any dereliction in duty they are responsible to the government, and liable upon their bonds executed as required by the postal laws. But while they are under this direct liability to the general government, there is no doubt a liability to the individual who sends, or is entitled to receive, mail through the particular office over which these officers are installed. They owe to the public and to the government a duty to use at least ordinary diligence in receiving and forwarding or properly delivering the mail. The great importance of the business with which they are intrusted enhances that duty; through these officers, as is well known and understood, are sent not only important communications requiring care and diligence in their protection and proper delivery, but often property and money of considerable amount and value. Every person's mail is sacred to him, and he is entitled to its first possession and perusal. This right and individual privilege is vouchsafed to him by the constitution and statutes of the United States, and so the general department of government cannot be held liable for the reasons mentioned. Whenever the loss, or breach of duty resulting in loss, can be traced to one of these officers of the department, the postmaster, his assistants or clerks commissioned by the government, or to their servants or agents, the individual officer guilty of the negligence or breach of duty may be held liable for the damages resulting therefrom. In *Keenan v. Southworth*<sup>1</sup> Mr. Justice Grey, in rendering the opinion, said: "The law is well settled in England and America that the postmaster-general, the deputy postmasters and their assistants and clerks appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders."

§ 390. — **Liability.**—From what has already been said it will be noticed that the liability of the postmaster, whenever he

<sup>1</sup> 110 Mass. 474, 14 Am. Rep. (U. S.), 242; *Schuler v. Lynch*, 8 613; *Lane v. Cotton*, 1 Ld. Raym. Watts (Pa.), 453.  
646; *Dunlop v. Monroe*, 7 Cranch

can be held liable for the loss of mail or mail matter, must rest entirely upon his individual negligence, and the recovery is had upon the implied contract upon his part to perform his duty with at least ordinary diligence. But it has been held that the plaintiff in order to recover is not bound to prove some particular act of negligence in relation to the letter or the package, and that the loss was the direct consequence of that particular negligence, but that any general proof of negligence tending to show that the loss was occasioned thereby, which satisfies the jury that it was so occasioned, is sufficient to sustain the issue for the plaintiff.\*

In *Schroyer v. Lynch*† the court say: "Deputy postmasters have nothing to do with the carrying of the mail by means of which letters, packets, etc., are conveyed and transmitted throughout the Union. . . . And seeing he has neither the appointment nor the control of those who do carry the mail, it would seem, therefore, impossible that he should be made liable as a common carrier, or for any losses or injuries saving those arising from ordinary neglect on his part. Ordinary neglect, when he has no assistant to attend to and perform the duties of the office, may consist in his not attending to the performance of the same himself in person with reasonable vigilance and care; or, where he has assistants in his not exercising that care and diligence towards them in the performance of the duties assigned to them, which every person of common prudence and capable of governing a family takes of his own concerns; and for every loss occasioned by the negligence of the deputy postmaster in this respect, I apprehend that he would be held responsible though the loss should be produced immediately by an accident, or a force that could not be avoided or resisted. Beyond this, however, as I conceive, the responsibility of a deputy postmaster does not extend."

In considering and summing up the English authorities upon this subject, the court further say: "The ground of these decisions seems to be that the postoffice establishment is to be considered as an engine of the government created by act of parliament for the purpose of revenue and police, and that the persons employed therein, being appointed to that end by the govern-

\* *Christie v. Smith*, 23 Vt. 663;      † 8 Watts (Pa.), 453.  
Danforth v. Grant, 14 Vt. 283.



ment, have no contracts with individuals interested in their services, either express or implied, which would render them liable to the latter for losses occasioned by the negligence of others, or for any losses sustained other than those arising from their own default or neglect of duty; but for losses of this latter description it is clearly settled that each postmaster is liable for his own neglect or delinquency."<sup>4</sup>

In *Dunlap v. Monroe*<sup>5</sup> it was held that, in order to make a postmaster liable for negligence, it must appear that the loss or injury sustained by the plaintiff was the consequence of the negligence, and that in order to make out such negligence it is competent to give in evidence the negligence of his assistant.

§ 391. — **Carriers of mail.**—Persons carrying the mail upon contract or appointment are employed by the department of the government having supervision of the mails, and are answerable to the postoffice department for any breach of duty of which they may be guilty, upon their bond, which in general must be given and which recites their duties; but outside of this liability to this department of the general government is the same liability to the public and the individual that has been mentioned and discussed in what has been said of postmasters. The mail carrier may be made liable to the individual for the loss of letters or packages whenever it can be proven that the loss was the result of his negligence. Like a postmaster he is bound to exercise at least ordinary care in preserving and carrying the mail that is intrusted to his care and keeping.<sup>6</sup>

<sup>4</sup> *Browning v. Goodchild*, 3 Wils. 443; *Stock v. Harris*, 3 Wils. 449, 450; *Whitfield v. La Dispencer*, Cowp. 765; 2 Kent's Com. 610; *Story on Bailm.*, 302.

<sup>5</sup> 7 Cranch (U. S.), 242.

<sup>6</sup> One who contracts to carry the mails for the government is neither a common carrier nor a

private carrier, and is not liable to the owner for money stolen from the mails by his subordinates; and his promissory note given therefor is without liability as between the parties. *Foster v. Metts*, 55 Miss. 77, 30 Am. Rep. 504.

## PART FIFTH

### CARRIERS

#### CHAPTER I.

##### CARRIERS—GENERALLY.

§ 392. Definition.

393. As to the history of carriers.

394. The importance and scope of the subject.

395. Carriers strictly a bailment relation.

396. Carriers are of two kinds.

397. Private or special carriers.

398. Duties and liabilities of private and special carriers.

399. The carriage of goods, or property, or passengers for reward.

§ 400. Increasing or diminishing liability by contract.

401. — Can he diminish liability.

402. When excused from liability if no contract.

403. Compensation and lien of the private carrier.

404. — Lien.

405. Special or private carriers without hire—Gratuitous service.

§ 392. Definition.—A carrier is defined to be one who undertakes to transport persons or property from place to place either with or without reward.

§ 393. As to the history of carriers.—It would no doubt be interesting and perhaps profitable to trace the history of carriers from their small beginnings through the earlier and interesting years of their growth; from the time when the business mainly consisted in transporting packages and light freight by pack animals and lumbering vehicles drawn by cattle or slow coach teams; the coming into use of the early coach conveying passengers, baggage and freight to and from the great metropolis and other points, and notice the favor into which the business grew; to consider the history of transportation by water, and the development of that great trade which has united with inseparable

bonds the interests of continents, kingdoms and republics, and in a measure furnishing them their means of defense; the introduction into our own country of the more advanced systems of transportation by steamboats and railroads, until the magnitude of the business embraced in the carrier trade is almost beyond comprehension; but we are not able to do so at this time, nor is it the object of this treatise; we can only call attention to it by way of introduction.

§ 394. **The importance and scope of the subject.**—There is no business carried on by men of these days that does not touch upon and involve more or less the subject of carriers. The rumbling wheels of trucks, express wagons and omnibus lines through the streets of our great cities, the immense docks, elevators and freight depots within our seashore towns, the ports of our great lakes piled high with freight, goods of all descriptions and kinds, the palatial steamers transporting thousands of passengers, all but speak to us of the immensity of the carrier trade; for out from these ports go the great trunk lines of railroads pushing their way into the great cities augmenting their business; into the smaller towns increasing their market facilities; across the rich farms and prairies; through the rock-bound ridges of the great mountain ranges, and beyond to the coast of oceans, almost as a thing of life; holding within their grasp the business destiny of nations; conveying the products of a continent from the farthest northern boundaries to the most extreme southern point; from the far east to the far west; from every business point to the great markets of the world.

With the electric telegraph spark we speak, and the producer of the west, by these carrier routes, hands his product of farm and mine and manufactory to the producer and consumer of the east, and he in turn on through wave and storm of ocean to the markets and consumers of the old world. Nor do steamships and vessels and railroads compass entirely the carrier trade. Added to these are the tens of thousands of smaller carriers, transfer lines, expressmen, truckmen, even down to the little fellow dressed in uniform and cap who delivers packages from house to house. Who can define and comprehend the scope and importance of our subject?

§ 395. **Carriers strictly a bailment relation.**—The carriage of freight and baggage may be said to be strictly a bailment relation and belongs generally to the mutual-benefit bailments, though

there may be gratuitous carrying of goods, or such a contract relation as will classify the business with almost any of the several kinds of bailments. The goods to be carried are generally put into the exclusive custody and control of the carrier by the owner, or shipper, while being carried to their destination and until delivered to the consignee.

**§ 396. Carriers are of two kinds.**—Carriers may be said to be of two kinds: (1) Private or special carriers, and (2) public or common carriers; and these two classes may be said to be again classified as carriers by land and carriers by water. The most important division, however, is that of private or special, and public or common carriers. This subdivision becomes important by way of fixing the liability and duty of the carrier, whether the relation belongs to the exceptional bailment to which attaches the exceptional or extraordinary liability, or to that class of carriers which are simply bailees of the property or goods carried.

**§ 397. (1) Private or special carriers.**—This class of carriers is just what the name imports — private or special carriers. A private or special carrier may be said to be one who agrees to transport goods, property or persons by special agreement or contract from place to place, either for hire or gratuitously. As, for example, the owner of a team and wagon, in the small town away from the railroad, contracts with the merchant of his village to haul his goods upon a particular occasion from the neighboring railroad town, for which he is to receive a consideration; the farmer agrees to carry his neighbor's wheat from his barn to the market town, for which he is to receive a compensation, or gratuitously renders the service; the friend or neighbor who is going upon a journey to a neighboring city, for the accommodation of his friend carries to the creditor of his friend an amount of money which he agrees to pay upon his indebtedness, and to return to him a receipt therefor, this being done either gratuitously or for a compensation. Other examples will occur to the reader. It is the performing of the service of carrying the goods or the property, or even the carrying of the person upon the special occasion, and not the carriage of goods or property or persons by one holding himself out to the public as being engaged in that business for hire. The distinction between the private or special carrier and the public or common carrier will be more clearly observed hereafter.

This class of carriers does not belong to the exceptional bailment class. They are not bound to receive and carry the goods of all who apply to them to do that service, but they may select their customers, fix their compensation, and the time the service is to be performed. They are in this respect, as will be noticed, somewhat analogous to boarding-house keepers; they are in no sense public servants, but are engaged in a private business. Should they desire to do so, however, there is no doubt but that the private or special carrier could by contract assume and become liable to perform the duties of a common or public carrier, and in such case the extraordinary liability would attach to him.

§ 398. Duties and liabilities of private and special carriers.—The consideration of the question of the duties and liabilities of the special or private carrier suggests a further classification, namely, (1) private or special carriers for hire or reward, (2) private or special carriers without hire — gratuitous service.

### I.

§ 399. The carriage of goods, or property, or passengers for reward.—The private or special carrier who carries goods, property or passengers for hire or reward belongs not to the class of carriers, as we shall see, known as common or public carriers, but to that class which has been designated as bailees for hire, and to that class of bailments known as mutual-benefit bailments. It perhaps approximates to the classification already discussed among the *locatio* bailments — “work and labor upon the thing.” The liability, therefore, would be the ordinary liability that applies where the bailment is for the benefit of both parties; in other words, the private or special carrier is bound to exercise ordinary diligence in carrying the goods and delivering them to the consignee, and is liable for ordinary negligence. As a private carrier it has been said he is “bound to use ordinary care and diligence such as a reasonably prudent man would exercise in the conduct of his own business, or in the preservation of his own property.”<sup>1</sup>

In *Samms v. Stewart*<sup>2</sup> it is said: “The general rule in refer-

<sup>1</sup> United States v. Power, 6 28 Vt. 268. In *Lamb v. Parkman* Mont. 271. (Dist. Mass.), 1 Spr. 343, it was

<sup>2</sup> 20 Ohio, 70-73; Story on Bailments, sec. 399; *White v. Bascom*, giving to the hirer the whole ca-

ence to a bailee for hire — that he is only answerable for the loss of the goods where he has been wanting in ordinary care and diligence — is in most cases a reasonable and just one, and is only departed from in the case of a common carrier on account of the peculiar relation that he has assumed to the community. Now we see no reason why the law applicable to a common carrier should be applied to a farmer who makes a personal application to a merchant for a load of goods, on his return trip from market. The merchant has it in his power to make such special bargain as he chooses, as to what shall be the liability of the farmer in case the goods are lost. The farmer has assumed no character to the community entitling him to peculiar confidence, and the merchant is left, as in ordinary cases, to an inquiry as to his character and qualifications. Nor do we suppose it would make any difference how many applications of this kind had been made by the party thus carrying, or to how many different persons they may have been made — they would still remain so many special and individual transactions." The court in that case held that a person occasionally carrying goods or property may be responsible in case of loss only as an ordinary bailee for hire, and to excuse him from liability he need only show that he has used ordinary care and diligence.

§ 400. **Increasing or diminishing liability by contract.**—The private carrier may by contract increase his liability even to the extent of that of a common carrier, but the increasing of liability for loss of or injury to the goods carried to the extent of that of an insurer of the property, or that of a common carrier, will not make him a common carrier or change his relations to the public. To do this he would take upon himself all the duties as to receiving goods and carrying the same as well as the extraordinary liability; in fact he would entirely lose his identity as a private carrier and become a common or public carrier. For example, the private carrier may by contract warrant the delivery of goods intrusted to him for carriage, and thus take upon himself the extraordinary liability rather than that of a bailee of whom is required but ordinary diligence.

§ 401. — **Can he diminish liability.**—There seems to be no doubt that a common carrier may also, by contract, diminish his

liability of the ship, the owner having no right to take goods for any other person, the owner is not a

common carrier, but a bailee to transport for hire, and as such is bound for ordinary care.

liability; but the rule applies to him as to other bailees — he cannot by contract excuse himself for fraud or for gross negligence. The rule is somewhat different in the case of a private carrier, and it may be said that where fraud or public policy is not involved, the private carrier could contract that he shall not be liable for any loss or injury; but this can only be in cases where the whole matter is free from fraud, or in other words, it must be a good-faith contract. For example, a merchant hires a farmer to haul his goods from the railroad to his country store; the farmer may agree to haul them, but may stipulate that he will not be responsible for any damage that may result to them from whatever cause the damage may come — as by the breaking down of his vehicle, or for any other reason; but if his contract should be that he would not be liable for loss by theft, and he himself should steal the property, or if he should have an alliance with others who did, in such case he would be held for the value of the property. So the matter rests entirely upon the question of good faith and public policy.

§ 402. **When excused from liability if no contract.**—A private carrier, being much like a bailee of the class known as *locatio* bailees, — bailees who undertake to do something upon the thing bailed, — the law seems to hold him to the same liability; they are excused from liability where the loss or injury occurs by reason of the act of God, the public enemy, or inevitable accident, as by accidental fire, or for loss by robbery, or burglary, or larceny; but in all these cases, as in cases already discussed, the carrier must be able to prove that in the exercise of ordinary diligence the loss could not have been avoided. He must not expose the property to any of these dangers if by ordinary diligence he can avoid it.

§ 403. **Compensation and lien of the private carrier.**—The private carrier may regulate his compensation and charges by contract for the carrying of the goods; but if he does not do so, and there is no stipulation as to compensation, he is entitled to a reasonable compensation, to be determined from all of the facts, and to be proven by the testimony of competent witnesses as to what such service under just such circumstances would be reasonably worth.

§ 404. — **Lien.**—It would seem from the weight of authority that the private carrier has no right to a common-law lien upon the goods carried for his compensation. Many of the writ-

ers upon this subject urge that there is no reason why he should not have such a lien, and that reasoning by analogy he certainly should have one. It is argued that the same reasons exist, for example, that obtain in the case of the warehouseman, and some have urged that the same reason obtains as in the case of a bailee who benefits the property by his service and materials.\*

It would seem, however, to be somewhat questionable whether the arguments made by these authors are based upon sound reasoning. The lien given to the artisan who performs labor upon the property and adds material by way of making repairs is given upon the theory that he has bettered the property. The innkeeper and common carrier are recognized as being entitled to a lien because they are in a measure public servants, and bound to perform services and furnish entertainment for all who apply. And it is upon this theory that their lien is given. No such reason can be said to exist in the case of the private carrier; his relation is one created entirely by a contract of his own making in each particular instance. He can make the contract and enter upon the service, or he may refuse, as he pleases; he may perform service to-day, or this week, or next week, or next month, as he pleases, regulating all by the particular contract. He may give credit for the services he performs, or he may demand his payment in advance, as he pleases. If the person who employs him, in his judgment, is one who is liable not to compensate him, he can provide for securing his compensation by the contract which he makes for the carriage of the goods. But it is urged that certainly the warehouseman should be no more entitled to a lien for compensation than the private carrier; that he is not bound to receive and store and care for the goods of all who may apply, and that the storing of the property can hardly be said to add benefit to it, as in case of the artisan. While this is true, and while perhaps there can be no more reason why the warehouseman should have a lien than that the private carrier should be secured by lien, yet it seems that there is quite a difference in the relation between a private carrier and a warehouseman; certainly the warehouseman is dealing

\* 1 Hutchinson, Carriers, sec. 46; Jones on Liens, sec. 276; Biddle, Dean & Co. v. N. Y., L. E. & W. R. Co., 1 Int. Com. 594-604. In this case the Interstate Commerce

Commission say: "The compensation of the common carrier is assured to him by a lien upon the goods—a right which is not enjoyed by a private carrier."



more largely with the public. Whereas the law may not compel him to receive the goods of all who apply and store them and care for them, he nevertheless, as a general rule, advertises and asks patronage from the whole public. He builds immense warehouses, and invites all who have goods to store, or grain to put in the elevators, to bring it to his warehouse. He is thus dealing with the public — dealing with those who apply; and it seems to have been on this account that his right to a lien for compensation is recognized. It would seem that there is a difference between such cases and cases where one seeks out the individual and makes with him a private contract, which may vary as circumstances vary, as to price, as to the manner of performing the contract and as to the time when it shall be performed; and so it would appear that the same reason does not exist in the case of the private carrier that exists even in the case of the warehouseman for the giving of security for services by a lien upon the property.<sup>4</sup>

## II.

**§ 405. Special or private carriers without hire—Gratuitous service.**—Where the carrying of the goods is gratuitous, the carrier being a bailee of the property intrusted to him, it would seem that the same rules as to liability must attach that obtain in the case of bailments for the sole benefit of the bailor — he would be held liable for gross negligence and required to exercise only slight diligence. What is gross negligence or slight diligence can only be determined by the circumstances of each particular case. No general or fixed definition, as we have seen, can be laid down; what would be ordinary diligence in one case might be gross negligence in another. The examples of special or private carriers without hire are numerous, and no doubt the mere suggestion brings to mind very many examples. A farmer who, for the accommodation of his neighbor, takes into his wagon,

<sup>4</sup> The cases are few upon this question. An early case in Pennsylvania is generally cited, *Fuller v. Bradley*, 25 Pa. St. 120, 121, which holds that a private carrier has no lien; the court adopting the charge of the court below which was in the following lan-

guage: "One who is not a public or common carrier, but specially undertakes to carry a particular load for hire has no lien for freight unless he specially reserves it." *Picquet v. McKay*, 2 Blackf. (Ind.) 465.

while going to the market town, bags of wheat to be left at the mill to be ground, or on returning, without compensation but for mere accommodation, brings for the miller flour which is to be delivered to the neighboring farmer; or where the neighbor who is traveling to some other city carries, without recompense, bonds to be delivered to a broker to be sold, or money to be paid upon his neighbor's debts, or any such like services of carrying goods or property, or money, or bonds, simply for accommodation, — in such cases there is no compensation; the sole benefit to be derived is derived by the bailor—the one who intrusts the property to the gratuitous carrier. If he receives compensation, as we have seen, he must exercise ordinary diligence, but if he receives no compensation he is not held to so high a degree as ordinary diligence.<sup>5</sup>

\* *Pender v. Robins*, 6 Jones L. (N. C.) 207. The captain of a vessel received watches which he was to carry for the owner and deliver gratuitously. He put them in his chest in the cabin he occupied, and while he was asleep thieves broke in and stole the

watches. The court held that under such circumstances the captain was liable only for gross negligence. *Colyar v. Taylor*, 1 Cold. (Tenn.) 372, where it was held that defendant was guilty of gross negligence and liable. *Fay v. Steamer New World*, 1 Cal. 348.

## CHAPTER II.

### PUBLIC OR COMMON CARRIERS

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riers.

§ 406. Definition.—The definition generally conceded to be correct and more often adopted than any other is that of Chief Justice Parker in the case of *Dwight v. Brewster*:<sup>1</sup> “A common carrier is one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place.” This definition is somewhat enlarged by Judge Cooley in his work on Torts: “A common carrier is one who regularly undertakes for hire, either on land or on water, to carry goods, or goods and passengers, between different places for such as may offer.” Another definition that has received commendation is one of an eminent jurist, as follows: “Any man undertaking for hire to carry goods of all persons indifferently.”<sup>2</sup> From

<sup>1</sup> 1 Pick. 50; Cooley on Torts, 638. Judge Cooley in his note to the text cites *Mershon v. Hobensack*, 22 N. J. 373. “No person is a common carrier if not a carrier for hire.” Citing *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16, and other cases.

<sup>2</sup> *Gisbourn v. Hurst*, 1 Salk. 249. This definition is said by Gibson, C. J., in *Gordon v. Hutchinson*, 1 Watts & Serg. 285, to be the best definition of a common carrier in its application to the business of this country. *Hutchinson on Carriers*, sec. 47, is as follows: “A

the accepted definitions of a common carrier it may be said that there are, among others, three most essential requisites:

1st. He must regularly undertake to carry goods for all who choose to employ him, or goods and passengers between different places for such as may offer.

2d. His undertaking and holding himself out to the public as a carrier must be such that in case of his refusal to accept and carry the goods in the regular course of his business he would be liable to an action for the damages that might result.

3d. The carriage of goods or passengers must be for hire.

§ 407. (1) **First essential requisite—The important and distinguishing essentials.**—The most important and distinguishing essential is, perhaps, the first one mentioned in the above section. The common carrier must regularly undertake to carry goods for all who choose to employ him, and to carry all passengers who apply for carriage. It is this that distinguishes the common carrier from the private or special carrier. The private or special carrier may, like the boarding-house keeper, select his customers; but the common carrier, like the innkeeper, must serve all who apply. The common carrier is therefore called a public carrier, and in some respects may be said to be a public servant, owing to the public the performance of certain duties and taking upon himself certain public responsibilities. He cannot, like the private carrier, choose his customers and make special contracts for carrying their goods or transporting them as passengers; he must carry goods and passengers at the regular rate, not giving to one advantages over others. It is the holding out to the public by the carrier that he is ready and willing to carry the goods of all who apply and pay the price for carrying that gives to him the characteristics that distinguish him from other carriers and fixes his relation as a common carrier.<sup>3</sup>

common or public carrier is one who undertakes as a business for hire or reward to carry from one place to another the goods of all persons who may apply for such carriage, provided the goods be of the kind which he professes to carry, and the persons so applying will agree to have them carried upon the lawful terms prescribed by the carrier, and who, if

he refuses to carry such goods for those who are willing to comply with his terms, becomes liable to an action by the aggrieved party for such refusal." *Carpenter v. B. & O. R. Co.* (Del. 1906), 64 Atl. 252; *Cownie Glove Co. v. Merchants' etc. Co.*, 130 Iowa, 327, 106 N. W. 749.

<sup>3</sup> Bound to receive all goods offered, which it is able and ac-

§ 408. **Second essential requisite—Determinate of the relation.**—Determinate of this relation, therefore, may be said to be the fact, not that he is engaged in a public employment, or that he carries goods to any fixed or particular place, but that, so far as his capacity for transporting goods or passengers will permit, he holds himself out to the public as ready and willing to carry the goods of all persons who choose to employ him and all passengers who apply. The relation must be so thoroughly defined and understood that in case of a refusal to receive and carry the goods, the terms of carriage being complied with, an action could be sustained against him for such refusal.<sup>4</sup>

§ 409. **The true test.**—Judge Simpson, for the supreme court of South Carolina, said: <sup>5</sup> “The true test of the character of a party as to the fact whether he is a common carrier or not is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry or must he carry for all? If it is his legal duty to carry for all alike who comply with the terms as to freight, etc., then he is a common carrier and subject to all those stringent rules which for wise ends have long since been adopted and uniformly enforced both in England and in all the states upon common carriers. If, on the contrary, he may carry or not as he deems best, he is but a private individual, and is invested like all other private per-

customed to carry, *Southern Ex. Co. v. R. M. Rose Co.*, 124 Ga. 581, 53 S. E. 185. Flood threatening inundation of tracks held sufficient excuse for refusing to receive goods. *Gray v. Wabash, etc. R. Co.*, 119 Mo. App. 144, 95 S. W. 983. If capacity not overtaxed bound to furnish cars for shipment. *Hoffman, etc. Co. v. St. Louis, etc. R. Co.*, 119 Mo. App. 495, 94 S. W. 597.

<sup>4</sup> *Southern Exp. Co. v. Rose Co.*, 124 Ga. 581, 53 S. E. 185, 5 L. R. (N. S.) 619, and notes; *Nugent v. Smith*, L. R. 1 Com. P. Div. 27. The court say: “The real test of whether a man is a common carrier, whether by land or water, therefore really is whether he has held out that he will, so long as he

has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried. If he does this, his first responsibility naturally is that he is bound by a promise implied by law to receive and carry for a reasonable price the goods sent to him upon such an invitation.”

<sup>5</sup> *Piedmont Mfg. Co. v. Columbia River Co.*, 19 S. C. 353.

sons with the right to make his own contracts, and when made to stand upon them. While the law has imposed duties and heavy responsibilities upon common carriers which they cannot avoid, limit or shake off, yet it has never attempted to hamper and surround those who are not common carriers with the stringent rules applicable to carriers, or to prevent them from exercising their own judgment as to the responsibilities which they are willing to assume in a special case."

**§ 410. May limit the employment to certain kinds of property.**—While from the generally accepted definition of a common carrier it might seem that the carrier will not be permitted to limit his employment as to the kind of property he will carry, yet there can be no doubt that he may do so. As, for example, the carrier of freight and passengers cannot be compelled to carry small packages or bundles, or money, or such kind of goods as belong especially to the express company's business. Or the carrier who is engaged in running a ferry-boat for the carriage of passengers could not be compelled to carry freight, or be held liable for the carriage of parcels which were delivered to the captain of the boat to be carried to some consignee. He has limited his employment to the carriage of passengers upon his ferry-boat, and he cannot be compelled to carry property which is not in the line of his employment. Judge Story says: "To bring a person within the description of a common carrier he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*."\* In

\* Story on Bailments, sec. 495; *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285; *Mershon v. Hovensack*, 22 N. J. Law, 377; *Verner v. Switzer*, 32 Pa. St. 208. In *Moss v. Battis*, 4 Heisk. (Tenn.) 661, the defendant was a farmer, and, after his crops were harvested, he ran a boat for himself or any one else who would employ him. He built a flat boat to transport to market a cargo of his own staves, but at the request of the plaintiff he abandoned his intention and loaded

his own boat and one furnished by the plaintiff with lumber, and undertook to carry it by river to market. The boat struck an obstruction, was sunk, and a part of the lumber was lost. He was held to be a common carrier. This has been held in other Tennessee cases. *Johnston v. Friar*, 4 Yerg. 48; *Gordon v. Buchanan*, 5 Yerg. 71; *Turney v. Wilson*, 7 Yerg. 840. The ruling seems to be rather exceptional. See *Hutchinson on Carriers*, sec. 52.

*Citizens Bank v. Steamboat Co.*,<sup>1</sup> Judge Story very clearly states the doctrine: "A steamboat may be employed, although I presume it is rarely the case, solely in the transportation of passengers, and then the liability is incurred only to the extent of the common rights, duties and obligations of carrier vessels of passengers by sea, and carrier vehicles of passengers on land; or they may be employed solely in the transportation of goods and merchandise, and then, like other carriers of the like character at sea and on land, they are bound to the common duties, obligations and liabilities of common carriers; or the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the owners will not be liable as common carriers for any other goods or property intrusted to their agents without their consent. The transportation of passengers or of merchandise, or of both, does not necessarily imply that the owners hold themselves out as common carriers of money or bank bills. It has never been imagined, I presume, that the owners of a ferry-boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatman or other servants of the owners, where the latter had no knowledge thereof and received no compensation therefor. In like manner the owners of stage-coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the boatman employed by them to be carried from one place to another on their route where the owners received no compensation therefor, and did not hold them-

<sup>1</sup> *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.), 17; Redfield's Law of Railway Carriers (2d ed.), 1. The test as claimed by some of the authors seems to be, is the business habitual, not merely casual? *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Samms v. Stewart*, 20 Ohio, 69. There are cases, however, that hold that the business need not be continual, but that the test is more confined to his holding himself out as ready and willing

to carry property of all who apply. In *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, the court decidedly holds that it is not necessary that transportation should be his principal business; that even if it is merely an occasional business it would be enough, provided, of course, he holds himself out as ready and desirous of carrying the property of all who may apply. *Mores v. Norris*, 4 N. H. 306; *Haynie v. Baylor*, 18 Tex. 498; *Farley v. Lavery*, 54 S. W. 840.

selves out as common carriers of such parcels. *A fortiori* they would not be liable for the carriage of parcels of money or bank bills, under the like circumstances. So, if money should be intrusted to a common wagoner not authorized to receive it by the ordinary business of his employers and owners, at their risk, I apprehend that they would not be liable for the loss thereof as common carriers, any more than they would be for an injury done by his negligence to a passenger whom he had casually taken up on the road. In all these cases the nature and extent of the employment or business which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties and liabilities. The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business in which the owners hold themselves out to the public as engaged? They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or they may limit their employment and business to the carriage of any one or more of these particular matters."

§ 411. (3) **Third essential requisite—Carriage must be for hire.**—If the carrier is to receive no compensation, and the service is gratuitous, we have seen that the carrier must of necessity be a private or special carrier, for in such case he is but a gratuitous bailee.<sup>8</sup> To be a common carrier the service must be for some reward, no matter how small the compensation, or whether it be direct or indirect; if there is any benefit whatever derived from it to the carrier, it is enough to make him a common carrier. Even a promise of benefit or payment has been held to be sufficient. In *Pierce v. Railroad Co.*,<sup>9</sup> the action was to recover the value of eight bundles of bags which had been in use for two seasons in transporting grain by way of the river and defendants' railway. The defendants sought to avoid liability as a common carrier by showing a uniform and long established cus-

<sup>8</sup> In *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.), 35. Judge Story, in the opinion, says: "I take it to be exceedingly clear that no person is a common carrier in the sense of the law who is not a carrier for hire,—that is, who does not receive or is not en-

titled to receive any recompense for his services. The known definition of a common carrier in all our books fully establishes this result." *Louisville, etc. R. Co. v. Gerson*, 102 Ala. 409; *Kemp v. Coughtry*, 11 Johns. 107.

<sup>9</sup> 23 Wis. 387.



tom of the river and railway that the bags used in the transportation of grain were carried free of charge when empty, and claiming, because of this, that it could be held liable only in case of gross negligence. The court say: "It makes no difference that the custom is described as being to carry the bags free. In determining whether they are really carried free or not, the whole transaction between the parties must be considered, and when this is done it is found that all that is meant by saying that the empty bags are carried free is, that the customer pays no other consideration for it than the freight derived from the business they give the company. But this, as already seen, is sufficient to prevent the transportation of the bags from being gratuitous."<sup>10</sup>

§ 412. Carriers by water as well as by land.—Carriers by water, including carriers upon the high seas, where they carry goods for hire and hold themselves out as ready and willing to serve all who come, are held to be common carriers and subject to the liabilities that attach to common carriers. In *Liverpool Steamboat Co. v. Phœnix Co.*,<sup>11</sup> Mr. Justice Gray, in rendering the opinion of the court, says: "By the settled law, in the absence of some valid agreement to the contrary, the owner of a

<sup>10</sup> *Smith v. Railroad Co.*, 24 N. Y. 222; *Steamboat New World v. King*, 16 How. (U. S.) 469. In this case it was held that under a general custom of steamboats to carry Steamboat men free, a steamboat man riding on a free ticket was not to be regarded as a gratuitous passenger; but that the consideration was to be found in those advantages which induced the establishment of the custom. In *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442, the carrier was employed to transport certain live stock, and stipulated to carry members of the firm, the plaintiff or such other persons as the firm should employ to take charge of the stock during the transit, defendants claiming that the carriage of passengers was without compensation; and there was

also a clause in the contract that "the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause." The court held, however, that it could not be considered a free carrying of the passengers who had charge of the stock, and for any injury to them the company must be held as common carriers.

<sup>11</sup> 129 U. S. 397, 437; *Story on Bailments*, sec. 501; *The Niagara*, 21 How. 7, 23; *The Lady Pike*, 21 Wall. 1, 14; *Portfield v. Humphreys*, 8 Humph. (Tenn.) 497; *The Schooner Emma Johnston*, 1 Sprague (U. S.), 527; *The Propeller Commerce*, 1 Black (U. S.), 582; *The Schooner Reeside*, 2 Sumn. (U. S.) 567; *Parker v. Flag*, 26 Me. 181.

general ship carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier with the liability of an insurer against all losses except only such two irresistible causes as the act of God and public enemies." It has been said, however, that "if the owner of a ship employs it on his own account generally, or if he lets the tonnage with a small exception to a single person, and then, for the accommodation of a particular individual, he takes goods on board for freight (not receiving them for persons in general), he will not be deemed a common carrier but a mere private carrier, for he does not under such circumstances hold himself out as engaged in a public business or employment."<sup>12</sup> This would seem at first blush not to be in harmony with the class of cases already quoted, where it is held that it is not necessary, in order to be held a common carrier, that the person should be habitually and continually engaged in the business of carrying goods for hire for all who may apply, but that if he carries goods at particular times or seasons for hire, holding himself out as ready and willing to carry for all, he would be a common carrier. It will be noticed, however, that these holdings do not include cases where goods are carried for a private person, or for the accommodation of a "particular individual," and that therefore the holding is in harmony with the cases cited.

§ 413. Who are common carriers.—Having thus defined common carriers and discussed the essentials, and determined that carriers by water will, if carrying under the same circumstances, be common carriers the same as carriers by land, we can make the application of the principles noticed to carriers generally, and determine who are common or public carriers. To name them all, however, would be somewhat difficult, for it must be seen that they embrace a very large class. For example, carriers by water have been held to comprise owners of general ships, masters of steamers, steam vessels engaged in coasting trade, inland trade, canal companies, owners of flat boats holding themselves out as ready and willing to receive freight from the public generally; in fact, the owners of almost any craft, whether plying upon the lakes, upon the high seas in the coasting trade, or in our navigable rivers, are common carriers if engaged in the carriage of goods for hire and holding themselves out to the

<sup>12</sup> Story on Bailments, sec. 501; Nugent v. Smith, 1 C. P. Div. 28.

public generally as ready and willing to carry freight or property or passengers for all who apply.

§ 414. **Tugs and tow-boats.**—In the case of *The J. P. Donaldson*<sup>13</sup> the question discussed by the court, among other things, was whether a tug-boat engaged in towing a barge was a common carrier and subject to the extraordinary liability that attaches to such carriers. This question has been several times before the courts, the contention being that the tug-boat companies hold themselves out as ready and willing to take any and all vessels or transports loaded with freight, or otherwise, in tow for hire, and conduct them to whatever place is desired within the limits of their ability, and that while so having the vessel or transport in tow it is entirely within their control and custody. The weight of authority seems, however, not to sustain the contention, holding that while the towing-boat or tug may have control of the vessel or transport to the extent of directing her course and controlling her progress, the company or owners of the tug have no control over the cargo; that it is in the immediate control and custody of those in control of the transport upon which it is being carried; and in case of accident they would be expected to take care of the property and protect it to the utmost extent of their ability.

Mr. Justice Gray, in delivering the opinion of the court in *The J. P. Donaldson*, said: "While the tug is performing her contract of towing the barges, they may indeed be regarded as part of herself in the sense that her master is bound to use due care to provide for their safety as well as her own, and avoid collision either of them or of herself with other vessels.<sup>14</sup> But the barges in tow are by no means put under the control of the master of the tug to the same extent as the tug herself, and the cargo, if any, on board of her. A general ship carrying goods for hire, whether employed in internal, in coasting or in foreign commerce, is a common carrier, and the ship and her owners, in the absence of a valid agreement to the contrary, are liable to the owners of the goods carried as insurers against all losses, excepting only such irresistible causes as the act of God and public enemies.<sup>15</sup> But a tug and her owners are subject to no such lia-

<sup>13</sup> 167 U. S. 602.

<sup>15</sup> *Liverpool Steamboat Co. v.*

<sup>14</sup> *The Syracuse*, 9 Wall. 672, *Phoenix Ins. Co.*, 129 U. S. 397, 437, 675, 676; *The Civilta*, 103 U. S. 380, 699, 701.

bility to the owners of the vessels towed or of the cargoes on board of them. The owners of those vessels or cargoes cannot maintain any action for the loss of either against the tug or her owners, without proving negligence on her part. As was said by Mr. Justice Strong, and repeated by the present Chief Justice: <sup>16</sup> 'An engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.' "

The authorities, however, are not entirely harmonious upon this subject, and there are jurisdictions where it is maintained that tugs are common carriers, and that the vessel they are towing is being conveyed by them as a common carrier, and that they are subjected to the same extraordinary liability.<sup>17</sup>

§ 415. **Contrary holdings.**—The cases cited are such, for example, as where the tug continually and habitually as a business plies between certain points, holding out to the public that they will take in charge vessels or barges or crafts, and tow them to certain points. In some cases where the vessel being towed would be unable to make her way except when assisted by the tow-boat, it is claimed that in such case the tow-boat company

<sup>16</sup> *The Webb*, 14 Wall. 406, 414; *The Burlington*, 137 U. S. 386, 391; *The L. P. Dayton*, 120 U. S. 337, 351. In *Transportation Line v. Hope*, 95 U. S. 297, in which the owner of a large barge maintained an action against the owner of a tug for negligence of the master of the tug by which the barge was totally lost, it was held by the supreme court of the United States that while the tug had the control of the barge, so far as it was necessary to enable it to fulfill its contract to tow the barge

she did not occupy the position of a common carrier, not having that exclusive control which that relation would imply. It did not have to pay the master and the men in charge, nor did it exercise that internal control of her cargo, its storage, its protection and the like which belonged to a bailee.

<sup>17</sup> *Sproul v. Hemingway*, 14 Pick. 1, 25 Am. Dec. 350; *White v. Steam Tug Mary Ann*, 6 Cal. 462, 65 Am. Dec. 523; *Ashmoore v. Pennsylvania Steam-towing Co.*, 28 N. J. L. 180.

or owner is in entire control of the vessel towed, and that it should be as liable for the cargo of the vessel as though the vessel, cargo and all were loaded upon her decks.<sup>18</sup>

§ 416. *Ferry-boats.*—Ferryman are held to be common carriers, and it may be said that the authorities generally concede that this relation exists and applies to ferrymen and ferry companies. To this rule, however, it must be conceded that there are limitations, but which would apply, perhaps, only where the owner of the ferry-boat has not the full custody and control of the property on board. As, for example, where a passenger takes on board hand baggage, or parcels which he keeps in his possession and under his control, in such case it cannot be said that any of the reasons of public policy upon which the extreme liability of common carriers is based apply.<sup>19</sup>

<sup>18</sup> *Bussey v. Miss. Valley Transp. Co.*, 24 La. Ann. 165, in which Judge Howell held that the conflict of authorities except in *Brown v. Clegg*, 63 Pa. St. 51, is more imaginary than real, saying: "There are two very different ways in which a steam tow boat may be employed, and it is likely that Mr. Story (*Story on Bailm.*, sec. 496) was contemplating one method and Mr. Kent (2 *Kent's Com.* 599) the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel, or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee, or the towing may be casual merely, and not as a regular business between fixed termini. . . . And it might well be said that under such circumstances the tow-boat or tug is not a common carrier. But a second and quite different method of employing a tow-boat is where it plies regularly between fixed termini, towing for hire and for all

persons barges laden with goods, and taking into her full possession and control, and out of the control of the bailor, the property thus transported. . . . It seems (meaning the last above condition) to satisfy every requirement in the definition of a common carrier. . . . We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if the barge, being much smaller, had been carried, cargo and all, on the decks of their tug."

<sup>19</sup> *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32-34. "While ferrymen, by reason of the nature of the franchise they exercise, and the character of the services they render to the public, are held to extreme diligence and care, and to a stringent liability for any neglect or omission of duty, they do not assume all the responsibility of common carriers. Property carried upon a ferry-boat in the custody and control of the owner, a passenger, is not at the sole risk either of the ferryman or the

§ 417. — **Carriers by land.**—So numerous are the common carriers by land that it would hardly be possible for us to mention them all, nor would it be profitable, as we can determine who are common carriers by an application of the rules already discussed and to be discussed in this chapter. It may, however, be profitable to mention a few and to discuss the law applicable to their case.

§ 418. **Hackmen and omnibus men.**—Persons who are employed for hire in carrying passengers and baggage, and soliciting general patronage from the public in that particular line, are common carriers. In *Parmelee v. McNulty*<sup>20</sup> the court say: "The court was authorized to take notice that the owner of an omnibus line is a common carrier just as much as the owner of a railroad or a line of steamboats. The court will take notice of the general meaning of words, and we know that an omnibus line means a line of coaches for the carriage of passengers and their baggage;"<sup>21</sup> and in the absence of an express contract, a carrier of passengers by hackney coach was held liable for injuries resulting from his negligence to a gratuitous passenger.<sup>22</sup>

§ 419. — **Truckmen, cartmen, and owners of wagons.**—In every city and town, and generally about every railway station, are found those who are engaged in carting freight carrying express, boxes, trunks, packages, and whatever they can obtain within their line to carry for hire. They are engaged in a

owner. Both have duties to perform in respect to it. If lost or damaged by the act or neglect of the ferryman, he must respond to the owner. The ordinary rules governing in actions for negligence apply, and a plaintiff cannot recover if he is guilty of negligence on his part, contributing to the loss. The liability of a common carrier, in all its extent, only attaches when there is an actual bailment, and the party sought to be charged has the exclusive custody and control of property for carriage. A ferryman does not undertake absolutely for the safety of goods carried with and under the control of the

owner; but he does undertake for their safety as against the defects and insufficiencies of his boat, and other appliances for the performance of the services, and for the neglect or want of skill of himself and his servants." *White v. Winnisimet Co.*, 7 Cush. 155; *Willoughby v. Horridge*, 12 Com. B. 742; *Walker v. Jackson*, 10 M. & W. 161.

<sup>20</sup> 19 Ill. 556; *Bonce v. Dubuque*, etc. R. Co., 53 Iowa, 278, 36 Am. Rep. 221.

<sup>21</sup> *Hutch. on Car.*, secs. 59, 60; *Parmelee v. Lowitz*, 74 Ill. 116.

<sup>22</sup> *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799.

public employment; they are public carriers. To such the owners of property intrust their goods; placing them in their entire custody and control to be carried to the desired destination. Such persons carrying for hire, and holding themselves out to the public as ready to engage in the carrying trade within the course of their particular employment, are common carriers, and as such are subject to the duties and liabilities of common carriers. A rather extreme case is given us by the supreme court of Illinois, but which is undoubtedly sound in principle. In a case involving this question the court held: "Where a person, whose principal pursuit is farming, solicits goods to be carried to the market town in his wagon on certain occasions, he makes himself a common carrier for those who employ him."<sup>23</sup> During the time he is engaged in the public employment he solicits all who have such property or articles to be carried to intrust them to him, and pay him for transporting them.

§ 420. — **Street-car companies.**—Street-car companies are without question common carriers of passengers. There seems to be no dissent to this question. In this vocation, however, they are not liable as insurers of their passengers' safety, but, as we shall see, are liable only for negligence in case of injury. They are also common carriers, and subject to liability as such when they engage in carrying goods for hire or baggage for their passengers, as other common carriers. In later years these companies, having pushed their lines out into the country surrounding their home cities, in the way of suburban lines, have become an important factor in the carrying trade. We find them carrying not only passengers but also baggage and freight, and they must unquestionably be classed with railroad companies as being engaged in the same business and subject to the same liabilities.<sup>24</sup>

<sup>23</sup> Jackson Agr. Iron Works v. Hurlburt, 158 N. Y. 34-37, held: "Hackmen, wagoners and porters who undertake to carry goods for hire as a common employment in a city, or from one town to another, are common carriers. It is not necessary that the exclusive business of the parties shall be carrying."

<sup>24</sup> Citizens' Street Ry. Co. v. Twi-

name, 111 Ind. 587. "A street railway company is a common carrier of passengers with duties and responsibilities analogous to those of a railroad company, and is required to exercise the highest degree of care and skill in the transportation of passengers by providing suitable tracks, rolling stock, etc., keeping pace with science, art and modern improve-

§ 421. **Express companies.**—There has been a great deal of contention upon the part of the express companies in the courts as to whether they are common carriers or simply forwarders, because of the manner of carrying on their business, depending as they do for carriage of the goods intrusted to them upon other companies, the express companies, as a rule, having no vehicles of their own, except, perhaps, their trucks or wagons supplied to the different offices for the delivering of express matter. For these reasons the express companies have contended that they should not be held liable to the extraordinary liability that attaches to common carriers of goods, but should be held simply liable as forwarders, and liable only for ordinary negligence and required to exercise only ordinary diligence. These contentions, however, have not found favor in the courts, and it may be said to be settled that express companies are common carriers; and this conclusion seems to have been arrived at because of the usual course of business of such companies. The goods are intrusted to them to be carried and delivered to the consignee, not by any particular route or in any particular way; the company may send them by railroad trains or by steamboats, or by any way it pleases so that they are delivered within a suitable time to the person to whom they are consigned. It is also understood and expected, and from the usual course of business the company impliedly agrees, that an agent or manager, as he is called, of the company's own appointing, will accompany the goods and take particular charge and care of them on the route. For this reason it cannot be said that the company does not have entire custody and control of the property during the entire time of transit. Upon their arrival in the city or town to which they are sent, the manager or agent at once delivers them to the local agent of the company, who takes charge of them and delivers or causes them finally to be delivered to the consignee in person, or to his place of business or residence, and to persons authorized to

ments in their application to such transportation." In *Levi v. Lynn & Boston R. Co.*, 11 Allen, 300, in an action against a street railway corporation to recover for the loss of a box of merchandise delivered them to be carried for hire on the front platform of one of their cars, the plaintiff was per-

mitted, for the purpose of showing them to be common carriers, to prove that other persons had paid money to their conductors, with the knowledge of their superintendent, for the carriage of merchandise by them. The company was held liable for the value of the box.



receive them, so that the property sent by express companies may be said to be more exclusively and particularly in the control of the express companies during transit than in most cases where property is transferred by common carriers. The supreme court of Massachusetts, in *Buckland v. Adams Express Co.*,<sup>25</sup> very fully and clearly discusses this question, holding that the name or style under which they assume to carry on their business is wholly immaterial; the real nature of their occupation, and of the legal duties and obligations which it imposes on them, is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the em-

<sup>25</sup> 97 Mass. 124, 93 Am. Dec. 68; *Dwight v. Brewster*, 1 Pick. 50, 53; 2 *Redfield on Railways*, 1-16; *Kentucky Bank v. Adams Exp. Co.*, 93 U. S. 174; *Christenson v. American Exp. Co.*, 15 Minn. 270, 2 Am. Rep. 122. In this case the express company undertook by their receipt to the consignor to limit their liability to mere forwarders. The court in its opinion makes a full statement of the course of business of the express company, stating that they are engaged probably in the business of transmitting for hire goods from place to place. That they establish local offices at which agents are stationed whose duty it is to receive goods transmitted and deliver the same to the consignee as well as to receive goods for transmission; that the express companies own no vehicles or other means of transportation except such as are kept at their local office and used for carrying goods to and from such office and to their customers; that the practice of the company is to transmit goods by steamboats, railroads, coaches, etc., owned and controlled by other parties. That a messen-

ger of the company accompanies the goods in their transmission. After a full statement of the case, and holding that the express company is a common carrier, the court say: "The defendants style themselves express forwarders and they agree to forward the goods, but this language does not necessarily give them the character of simple forwarders, nor prevent them from being treated as common carriers." *Read v. Spaulding*, 5 Bosw. 404; *Sweet v. Barney*, 23 N. Y. 335; *U. S. Exp. Co. v. Backman*, 28 Ohio St. 144; *Verner v. Sweitzer*, 32 Pa. St. 208; *Southern Exp. Co. v. McVeigh*, 20 Grat. (Va.) 264; *Hutchinson on Carriers*, 68-71; 2 *Redfield on Railways*, 19-30; *Merchants' Disp. Co. v. Bloch*, 86 Tenn. 392, held: "A transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, is a common carrier, and subject to all the responsibilities attaching to that character." 6 Am. St. Rep. 847.

ployment of receiving, carrying and delivering goods, wares and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at the point of destination to a consignee or agent there authorized to receive it. This statement embraces all the elements essential to constitute the relation of common carrier on the part of express companies toward the persons who employ them.

§ 422. — **Fast-freight lines, dispatch companies, etc.**—A very large trade or class of business has grown up and is carried on by companies calling themselves dispatch companies, fast-freight lines, etc. These companies generally, but not always, own their own vehicles or cars, in which the goods intrusted to them for carriage are transported, employing railroad companies to haul them to their destination; but in some cases when not using their own cars, they employ the railroad companies to transport the freight in their vehicles; all such companies are held to be common carriers and are held to the extraordinary liability that attaches to such carriers. They receive the freight from the consignor, and contract to carry it and deliver it to the consignee. The custody and control of the property is handed over to these companies by the consignor for the purpose of being transported. They take the property into their custody and control, and are obliged by their contract, express or implied, to carry and deliver it to the consignee. They are bound to comply with all the requirements incident to the business of a common carrier, and are held to the same liability.\*

§ 423. — **Transfer companies.**—So companies in the several towns and cities who solicit the business of transferring for all who apply to them and pay the compensation, baggage or

\* *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174. It was held "that a party engaged as a common carrier cannot by declaring or stipulating that he shall not be so considered divest himself of the liability attached to the fixed legal character of that occupation. A common carrier who undertakes for himself to perform an entire service has no authority

to constitute another person or corporation the agent of his consignor or consignee; he may employ an agency, but it must be subordinate to himself and not to the shipper, who neither employs it, pays it, nor has any right to interfere with it; its acts become his because done in his service and by his direction." *Hutchinson on Carriers*, sec. 72.

freight from one railroad or steamboat station to another, or who deliver baggage or freight to the owners and consignees, are common carriers, and as such liable for the loss of or injury to the property. It has been held, however, that when these companies transfer freight between connecting carriers they are acting as the agents of the carriers, and are not liable as common carriers, upon the principle, it would seem, that the control of the goods is not in their hands, but is with the carriers who employ them. A late case has held that this is the rule when transferring goods at the end of the route to the consignee, the transfer company acting for the carrier.<sup>27</sup>

§ 424. **Railroad companies.**—Railroad companies are, as has been said by an eminent jurist, “eminently common carriers,”—common carriers of passengers and common carriers of freight. As common carriers of passengers their duties and liabilities are, as we shall see, very different from their duties and liabilities as common carriers of goods. That they hold themselves out to the public as common carriers there can be no doubt. Their whole purpose and aim and course of business proclaim that their desire and business is to carry the goods of all who call upon them for that service. They are the most important of the carriers. Railroad companies construct their great thoroughfares through the country for the purpose of meeting the demands of the public for the transportation of merchandise and passengers. They have often been the pioneers of new and undeveloped sections of country, pushing their way across the broad, uncultivated prairies of the west, even scaling the great mountain ranges, opening new agricultural interests, developing the farms, showing the mine owners of the immense coal and iron fields as well as of the more precious metals a way to the great markets of the world, at the same time making it possible to

<sup>27</sup> *Nansen v. Jacobs*, 12 Mo. App. 125; affirmed, 93 Mo. 331, 30 Am. & Eng. R. Cases, 553; *Western R. Co. v. Cotton Mills*, 81 Ga. 522; *Da Pointe v. New Orleans Transfer Co.*, 42 La. An. 696; *Verner v. Sweitzer*, 32 Pa. St. 208. In *Da Pointe v. Transfer Co.*, “a passenger on a railway train, having arrived at the point of destination, entered into a contract with a

transfer company for an agreed compensation to procure his baggage from the railroad company's depot and haul it to his residence, and for that purpose surrendered his baggage checks. Held, that the transfer company was responsible to the passenger for the safe-keeping and delivery of the baggage.”

operate and develop these valuable properties, and always soliciting the great carrying trade as common carriers.<sup>28</sup>

§ 425. **Receivers and trustees.**—And so it may be said that receivers and trustees of railroad companies, who operate the road as such officers, are common carriers; they are simply the agents of the company, subject to the same liability.

§ 426. — **Not all railroad companies are common carriers.**—There are, as it is well understood, railroads built and operated by private persons, companies or corporations for their own private use; as, for example, logging roads, built for the purpose of hauling out logs from tracts of timber land; roads built into coal-mines or iron-mines, used only and exclusively for the accommodation of the particular property of the owners;<sup>29</sup> or where the company owns and furnishes the motive power and rolling-stock, all of which is operated and controlled by others.<sup>30</sup> It is the

<sup>28</sup> *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray, 263, 269. "That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law, and make them eminently common carriers. Their iron roads, though built, in the first instance, by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can only be justified on that ground. The general principle has been uniformly so decided in England and in this country; and the point is to ascertain the precise limits of their liability. . . . Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods during the transit, except those arising from the act of God or a public enemy."

*Thomas v. Boston, etc. R. Co.*, 10 Met. 472, 43 Am. Dec. 444; *Sandford v. Catawissa, etc. R. Co.*, 24 Pa. St. 376, 64 Am. Dec. 667. In *Messenger v. Pa. R. Co.*, 36 N. J. Law, 407, 13 Am. Dec. 457, the court say: "In my opinion a railroad company, constituted under statutory authority, is not only by force of its inherent nature a common carrier, . . . but it becomes an agent of the public in consequence of the power conferred upon it."

<sup>29</sup> *Wade v. Litcher, etc. Co.*, 74 Fed. 517; *Avinger v. S. C. R. Co.*, 29 S. C. 265, 13 Am. St. Rep. 716.

<sup>30</sup> In *Coup v. Wabash, St. L. & P. R. Co.*, 56 Mich. 111, the plaintiff had a large circus property, including horses, wild animals and various paraphernalia, with tents and appliances for exhibition. He owned special cars fitted up for the carriage of performers and property, in which the whole concern was moved from place to place for exhibition. Plaintiff made a written contract with defendants to the effect that the

offering to use, and operating the road for the public to carry the goods of all who come, that makes the company liable as common carriers.

§ 427. **Who are not common carriers.**—While we will not at this time enumerate all who are engaged in seemingly *quasi*-public service or business who are not common carriers, it perhaps may be well to mention some of the avocations. Warehousemen and forwarding merchants are held simply as bailees of the mutual-benefit class, and liable for ordinary negligence and held to ordinary diligence.<sup>31</sup> So also sleeping-car companies; these companies do not control the trains which draw their cars, but are simply leased, as a general rule, by the railroad company that operates the train. The railroad company itself is liable so far as any extraordinary liability might attach. The sleeping-car companies are only liable in cases, as we shall see later, where they have taken the custody or control of the baggage of the passengers. So telegraph and telephone companies, postmasters, mail contractors, and many others; none of them are held to be common carriers.<sup>32</sup> And it has been held that canal companies are not common carriers in the sense that they are bound for the safe navigable state of the canal, being only bound to the exercise of reasonable care;<sup>33</sup> and that a canal company is not liable as a common carrier for timber lost from rafts transported by it, by theft, sinking or otherwise.<sup>34</sup>

railroad company was to furnish men and motive power to transfer the circus train by one or more divisions from Cairo to Detroit, with privilege of stopping for exhibition at three places named, fixing the time of starting from each place of exhibition; plaintiff to furnish his own cars, and two from another company in good condition and running order. A stipulated price was agreed upon which the plaintiff was to pay. Under such a state of facts the court held that the railroad company was not liable as common carriers. The court say "It is a misnomer to speak of such an

arrangement as an agreement for carriage at all. . . . All these special undertakings have peculiar features of their own, but they cannot be brought within the range of common carriage." *Mann v. White River, etc. Co.*, 46 Mich. 38; *Chicago, etc. R. Co. v. Wallace*, 66 Fed. 506.

<sup>31</sup> *Denny v. N. Y. Cent. R. R. Co.*, 13 Gray, 481, 115 Mass. 332, 8 Cow. 223.

<sup>32</sup> *Mann v. Logging Co.*, 46 Mich. 38, 41 Am. Rep. 149.

<sup>33</sup> *Pa. Canal Co. v. Burd*, 90 Pa. St. 281, 31 Am. Rep. 659.

<sup>34</sup> *Watts v. S. & O. Canal Co.*, 64 Ga. 88, 37 Am. Rep. 53.

## CHAPTER III.

### CARRIERS OF GOODS—SOME ESSENTIALS THAT FIX THE LIABILITY OF COMMON CARRIERS.

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| <p>§ 428. Object of the chapter—<br/>Some presumptions.</p> <p>429. Certain facts must be proven.</p> <p>430. Delivery of the property for transportation.</p> <p>431. The place of delivery.</p> <p>432. Usage and custom.</p> <p>433. Actual notice of deposit of goods.</p> <p>434. Time of delivery.</p> <p>435. By whom must delivery be made and to whom.</p> | <p>§ 436. — To whom must delivery be made.</p> <p>437. — Facts relied upon to show apparent authority must be clear.</p> <p>438. Agents authorized to receive.</p> <p>439. Constructive delivery.</p> <p>440. Rules permitting constructive delivery must be applied with great caution.</p> |
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§ 428. Object of the chapter—Some presumptions.—We have discussed in the previous chapter some of the essential requisites of a common carrier, determining that these requisites must exist in the given case before one can be held to be a common carrier. It is the object of this chapter to discuss the facts or essentials that must exist in order to fix upon the carrier liability for loss or injury of property delivered to him for carriage. From what has been said it follows that certain persons and companies holding themselves out to the public as ready to transport the goods of others for hire are common carriers, and so unquestionably and notoriously do they possess all the requisites that the courts without especial proof of these requisites will presume them to be such, and should they deny the relation, namely, that they are common carriers, the burden of proving that they are not would be upon them, as the presumption is so strong and the fact so generally understood; as, for example, railroad companies, steamboat companies, express companies, and all such persons and companies are generally known to follow the pursuit of carrying goods for all who apply to them and pay the compensation. But to fix the liability for loss or injury to the property carried by these common carriers much more is re-

quired, for the carrier is not called upon to respond in every case of loss, nor is he at all times liable to the extraordinary liability.<sup>1</sup>

§ 429. **Certain facts must be proved.**—Before the extraordinary liability can attach it must be shown that the goods lost or injured were delivered to the carrier for transportation in the usual and ordinary manner, and were of such a kind as the carrier holds out to the public he will carry, and as he is reasonably expected by the public to carry. The element that has much to do with fixing the liability is the placing of the property in custody and exclusive control of the carrier for the time for transportation. Then, too, the kind of goods, as we shall see, has much to do with fixing the liability, or rather, perhaps, in excusing the carrier from it; as, for example, whether the goods or property are animate or inanimate; whether perishable or otherwise, or whether from their own inherent nature liable to destruction or injury; for the common and ordinary understanding of men would lead one to know that the duties of the common carrier would be very much different in handling animate or inanimate freight, or perishable or destructible property, because of its own inherent nature, from that which is otherwise. Then, too, to fix the liability, it must further appear that the loss or injury occurred while the property was in the course of transportation, and that the loss or injury was not occasioned by any cause for which the common carrier could not be held legally liable. Each of these several questions calls for consideration, together with others that are important in fixing the liability of the carrier.

§ 430. **Delivery of the property for transportation.**—The primary essential in fixing the liability of the carrier is the delivery to him of the property by the shipper for carriage, or the tendering of the same in some cases. This delivery may be largely regulated by the reasonable rules and regulations of the carrier, and, when, so regulated, the shipper must follow these regulations as well as the requirements of the law. The delivery must be complete; the property placed in the custody and entire control of the carrier for immediate transportation.<sup>2</sup> If it is de-

<sup>1</sup> Hutchinson on Carriers, § 73.

<sup>2</sup> The liability of the carrier does not begin until there has been a complete delivery of the

goods for immediate transportation, with the knowledge and consent of the carrier. *Louisville, etc. R. Co. v. United States*, 39

livered with the understanding that it is to be held in the common carrier's warehouse for a time, or until the happening of some event which is to decide the question as to where the consignor will ship it, or if it is to be held for any length of time and then shipped, it cannot be said to be a delivery for shipment in the sense that binds the carrier to the extraordinary liability during the interim between such delivery and shipment; and in such case, as we shall see, the carrier for that time is only an ordinary bailee of the property, from whom is required ordinary diligence in caring for it. It is the complete delivery for immediate transportation, the surrendering of the entire custody and control of the property for the time for transportation, that fixes the liability of the common carrier; this is the important essential. And so it has been held that the relation of shipper and carrier does not begin between the owner of the goods and the common carrier, though the former may have delivered the goods to the latter, if, after such delivery, anything is required or remains to be done by the shipper, either because of the contract for shipment or on account of any of the rules or regulations of the company.<sup>3</sup> And where the goods were receipted for by the carrier's agent, who had no knowledge of their delivery except a slip signed by the boatman, it was held that no liability was created, the goods in fact not having been delivered to the carrier.<sup>4</sup> And where the agent of the carrier merely gave the

Ct. Cl. 405; *Garner v. St. Louis, etc. R. Co.* (Ark.), 96 S. W. 187; *Merritt v. Old Colony, etc. R. Co.*, 11 Allen (Mass.), 80; *Berry v. Southern R. Co.*, 122 N. C. 1002, 30 S. E. 14. Where delay was due to failure of railroad company to furnish cars, carrier liable for goods, although the shipper by the contract was obliged to load the freight. *London, etc. Co. v. Rome, etc. R. Co.*, 114 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752.

<sup>3</sup> It was held in *Wilson v. Atlanta, etc. R. Co.*, 82 Ga. 386, that "delivery of goods to a common carrier for transportation, whether actual or constructive, being a bailment, involves exclusive possession in the carrier, and this in-

volves a surrender of custody and control for the time being by the consignor." *St. Louis, M. & S. R. Co. v. Insurance Co.*, 139 U. S. 223; *Leigh v. Smith*, 1 Car. & P. 638; *Dixon v. Railroad Co.*, 110 Ga. 173. Where hogs had been brought to the railroad station to be transported, but at the time the train arrived upon which they were to be taken they were still in a private yard, and had still to be loaded, counted and receipted for, it was held that delivery was not complete, and the company could not be held liable for the delay. *Frazier v. Railroad Co.*, 48 Iowa, 571.

<sup>4</sup> *The Willie D. Sandhovel*, 92 Fed. 286; *St. Louis R. Co. v.*



shipper permission to place his cattle in the company's yards, no bill of lading having been given, in such case the company is not rendered liable for damages caused by the escape of the cattle.<sup>5</sup>

§ 431. **The place of delivery.**—When the goods have really been delivered to the carrier for shipment, according to the requirements mentioned in the previous section, and have been received for that purpose by the carrier or his agent, his liability as a common carrier commences. Indeed, the goods have already legally started upon their journey; they are in transit as much as though they had been loaded into the carrier's vehicle and were being carried over the road. The carrier, however, has the right to know that the property has been delivered for carriage, and it has been said that no legal delivery can be made without his knowledge. The carrier has the right, by reasonable rules and regulations, to fix the place where freight shall be delivered for transportation, and usually in cases of railway companies or transportation companies the place designated is at the warehouse of the company, or at some other convenient place named by the carrier. And so it has been held that freight left upon the platform or upon the dock, or deposited on a switch, or along the roadside, even though one of the company's servants promised to stop the train there and take it on; or the loading of goods upon a car standing on the side-track at the carrier's depot, done without the knowledge of the agent; or depositing goods in the yard of an inn from which the carrier starts his coaches, and not at a place or one of the places designated for receiving goods for shipment by the company, is not a delivery to the carrier in such a way as to render him liable as such for its loss or injury.<sup>6</sup>

*Knight*, 122 U. S. 79, 30 Lawyers' ed. 1077, held that the relation is not established until the specific lots of property intended for the carrier have been separated and set apart and delivered to the carrier for immediate transportation according to the terms of the bill of lading.

<sup>5</sup> *Ft. Worth & D. R. Co. v. Riley*, 1 S. W. 446; *Louisville & N. R. Co. v. Echols*, 97 Ala. 556, 12 So. 304; *Bennett v. The Guiding Star* (D. C.), 53 Fed. 936; *London*

*& L. Ins. Co. v. Rome, W. & O. R. Co.*, 23 N. Y. S. 231.

<sup>6</sup> *Oman v. Bedford, etc. Co.*, 67 C. C. A. 190, 134 Fed. 64; *In Grosvenor v. Railroad Co.*, 39 N. Y. 34, the court say: "To render a party liable as a common carrier it must be established that the property was actually delivered to the common carrier, or to some person duly authorized to act on his behalf. The responsibility of the carrier does not commence until the delivery is completed. It

§ 432. **Usage and custom.**—While the law demands a full compliance with the rules governing the delivery of the goods to the carrier and to the reasonable regulations of the carrier, nevertheless these rules and regulations are more or less varied and limited by usage and custom long continued, and which have become well understood by shippers and the public, and are in good faith acted upon. In fact, where such usage and custom has prevailed and for a long time been acquiesced in without change or objection by the carrier, it may be said that rules and regulations, so far as they infringe upon such usage and custom, have been displaced and are of no legal effect. And so the goods delivered for shipment in accordance with well established usage and custom will render the carrier liable, even though it be at a place outside of the carrier's warehouse, and at another place than that fixed by the express rules and regulations of the company. But in such case the usage must be strictly followed, and where it had become a custom accepted and understood that goods might be delivered to the mate of the ship, it was held that this custom or usage was not complied with by merely leaving the property on the wharf.<sup>1</sup> In *Wright v. Caldwell*,<sup>2</sup> the plaintiff, intending to take passage on the steamboat of defendant, deposited his trunk on board in the usual place for baggage, but without putting it in charge of any person, or notifying any one employed on the boat of such deposit, or of his intention to take passage, and while temporarily absent from the boat she started on her trip and he was left. The trunk could not afterwards be

is not enough that the property is delivered upon the premises unless the delivery is accompanied by notice to the proper person. The liability of the carrier attaches only from the time of the acceptance of the goods by him. To complete the delivery of the property, within the rules laid down in the authorities, I think it is also essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business and under his immediate control." Angell on Car., § 129; Story on Bailm.,

§ 532; *Packard v. Getman*, 6 Cow. 757; *Trevor v. U. & S. R. Co.*, 7 Hill, 47; *Blanchard v. Isaacs*, 3 Barb. 388; 2 Kent's Com. 604; *Dixon v. Railroad Co.*, 110 Ga. 173; *Louisville R. Co. v. Flanigan*, 113 Ind. 488, 3 Am. St. Rep. 674; *Brown v. Atlanta, etc. R. Co.*, 19 S. C. 39, 13 Am. & Eng. R. Cas. 479; *Houston R. Co. v. Hodde*, 42 Tex. 467; *Wilson v. Atlanta R. Co.*, 82 Ga. 386, 40 Am. & Eng. R. Cas. 25.

<sup>1</sup> *Leigh v. Smith*, 1 Car. & P. 639.

<sup>2</sup> 3 Mich. 51.

found. The court say: "It is admitted by the counsel for the plaintiff that to hold a common carrier liable in respect to property lost in the course of his employment, it is incumbent on him to show a delivery of the property to the carrier, and its acceptance by him, for purposes contemplated by the parties. But while this general principle of law is unquestioned, its force and effect is sought to be obviated by the special circumstances of this case. It is contended that the general principle is controlled by the usage established by the proof. It is well settled by a series of adjudications of high authority, that if a uniform custom is established and recognized by the carrier, and is known to the public, that property intended for carriage may be deposited in a particular place without express notice to him, that a deposit of property for that purpose in accordance with the custom is constructive notice, and would render any other form of delivery unnecessary. The rule is founded in reason; as the usage, if habitual, is a declaration by the carrier to the public that a delivery of property in accordance with the usage will be deemed an acceptance of it for the purpose of transportation." And where it appeared that by local custom, well understood and accepted by the shipper and carrier, goods might be delivered for shipment by placing them on the platform of the depot, it was held that such a delivery would support an action for goods so delivered which were destroyed by fire set by boys allowed to play upon that platform.\* And where it was shown to be the "constant and habitual practice and usage of the carrier to receive the goods when they are deposited for him in a particular place without special notice of such deposit, it was held sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties by which the goods when so deposited shall be considered as delivered to him without any further notice. Such a practice and usage are tantamount to an open declaration, a public advertisement by the carrier, that such a delivery should of itself be deemed an acceptance by him, and to permit him to set up against those who had been thereby induced to omit it, the want of the formality of an express notice which had been thus waived, would be sanctioning injustice and fraud."<sup>10</sup>

\* Ft. Worth & D. R. Co. v. Martin, 12 Tex. Civ. App. 464.

Am. Rep. 54, 18 Am. & Eng. R. Cas. 512; Hutch. on Car. § 90.

<sup>10</sup> Montgomery, etc. R. Co. v. Kolb et al., 73 Ala. 396-405, 40

The above, taken from the opinion of the court, is quoted from Hutch-

But where the goods were loaded in a car standing on a side-track, by the owner, who was desirous of shipping them, it was held not to constitute a delivery to the railroad company, where the station agent, being notified thereof, declined to ship the goods, there being no custom or regulation of the railroad company making such loading into the company's car a delivery.<sup>11</sup>

§ 433. *Actual notice of deposit of goods.*—As a general rule, however, if there is no custom or usage which might be said to govern the delivery of the property for shipment as mentioned in the previous section, notice of the delivery of the property, if delivered at some other place than that fixed and required by the rules and regulations of the company, must be given to the carrier or his agent, and his acquiescence in such delivery received, otherwise a deposit of the goods at an unusual place, as on the platform, or loading them in a railroad car, or depositing them upon the wharf instead of the place designated by the company, would not be held to be a delivery.<sup>12</sup>

§ 434. *Time of delivery.*—The time of delivering the goods must be at a reasonable hour, and generally in conformity with the requirements of the rules and regulations of the carrier, if any. Good sense and business methods dictate that the time the carrier should be compelled to receive freight for shipment would depend very largely upon the time of the running of its trains, the departure of its boats or other vehicles for transporting the goods. Generally, however, it may be said that the freight should be delivered within customary business hours, and if for transportation upon any particular boat or train, at a reasonable time before its departure. All this is subject, however, to the reasonable rules and regulations of the carrier, mod-

inon on Carriers. And it has been held that an agreement to receive goods for transportation deposited at a particular place, namely, upon the carrier's private wharf, would be implied where it has become a constant practice and usage to receive goods for transportation by the carrier and take charge of the property so deposited without any express notice of such deposit. *Marriam v. Hartford, etc. R. Co.*, 20 Conn. 345.

<sup>11</sup> *Evansville & T. H. R. Co. v.*

*Keith*, 8 Ind. App. 57, 5 N. E. 296; *Capehart v. Granite Mfg. Co.*, 97 Ala. 353; *Union Pac. R. Co. v. Hepner*, 3 Colo. App. 313, 41 Iowa, 410; *Galena, etc. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574.

<sup>12</sup> *Packard v. Getman*, 6 Cow. (N. Y.) 758, 16 Am. Dec. 475, 4 Wend. 615; *Grosvenor v. N. Y. Cent. R. Co.*, 39 N. Y. 34; *Salinger v. Simmons*, 57 Barb. 513; *Ill. Cent. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301.

ified, as we have seen, by custom and usage that have become well known and understood, and seem to have been accepted by the carrier. Where the shipper delivered the freight to be carried during a storm which afterwards resulted in its injury, it was held that the shipper should not be held guilty of contributory negligence if the carrier consented to receive the goods. Whatever objection he might have made was waived, and he became responsible for the security of his goods from the time of such acceptance.<sup>13</sup>

§ 435. By whom must delivery be made and to whom.—A good delivery of the goods for shipment may be made to the common carrier by the owner, a duly authorized agent, or any person to whom he has delivered the possession and control of the property with all the *indicia* of ownership. Apparent authority, as well as actual authority, may also be relied upon by the carrier in such cases. That principle of agency, too, that the agent is authorized to exercise all the powers necessary to effect the purpose of the agency, may be successfully invoked by the carrier. And so it has been held that "authority to deliver goods to a common carrier for transportation includes all the necessary and usual means of carrying it into effect. It can only be executed by obtaining the consent of the carrier to receive them, and the agent is therefore authorized to stipulate for the terms of transportation." Where a cartman, employed by persons from whom a valuable mirror had been purchased, and who agreed to forward it by the defendant carrier, signed a contract for the owner as agent, limiting the liability of the carrier in case the mirror was broken, the persons from whom the purchase was made consenting thereto, it was held that the defendant, by reason of the contract, was not liable, and that the authority to sign was incident to the authority to ship.<sup>14</sup> In *Hayes v. Campbell*,<sup>15</sup> it was held that where there are facts brought home to the carrier showing that the person shipping the property is a mere agent and not the owner, the carrier is put upon inquiry as to the authority of and the extent of the powers of such agent. Where wool was delivered at the station

<sup>13</sup> *New Brunswick Steamboat & Trans. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394.

*R. Co.*, 98 Mass. 239; *York Co. v. Cent. R. R. Co.*, 3 Wall. (U. S.) 107, 113.

<sup>14</sup> *Nelson v. H. R. R. Co.*, 48 N. Y. 498; *Squire et al. v. N. Y. Cent.*

<sup>15</sup> 63 Cal. 143.

of a common carrier in sacks marked with the name and address of the owner, whose place of business was in Boston, and with the initial of the agent who had purchased it, with the weights and numbers upon all the sacks, and it appeared that previous shipments had been made by the same agent at the same place to the same parties during the same season, and that when said agent delivered this wool he piled it into one part of the building and pointed it out to the carrier's agent, saying that that pile of wool is for Boston, it was held that this constituted a good and sufficient delivery.<sup>16</sup>

§ 436. — **To whom delivery must be made.**—It is a general rule that to render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him, or to some person authorized to act in his behalf, must be established. This is important, because his liability attaches only from the time he accepts the goods to be carried, or is legally bound to accept them. To complete the delivery of goods to the carrier it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent with his knowledge and consent.<sup>17</sup> It is a fact commonly known and understood that carriers generally act through their agents, and the question often arises, who are the duly authorized agents of the carrier? To determine this question we are to apply the ordinary rules of the law of agency. The shipper is not bound to make a full investigation in order to determine whether one is an agent of the carrier company. If the person has apparent authority, if he is in the place of the carrier, acting for him in the receiving of freight and sending it forward, so engaged that to the ordinarily prudent business man it would appear that he had authority to act and was acting for and with the knowledge of the company, it is sufficient. If the person is accustomed to act for the company, and has been so doing for a considerable time, so long and so often that it could be reasonably inferred that the carrier must know that he is acting, he will be held to have authority to act. Where a package for an express company was delivered to a person in charge at the railroad depot who had been accustomed to receive such packages for the company, it was held, in an action against the

<sup>16</sup> *Nichols v. Smith*, 115 Mass. 332.

<sup>17</sup> *Grosvenor v. N. Y. Cent. R. Co.*, 39 N. Y. 34.

company for failure to deliver the package, that the delivery to the company was sufficient.<sup>18</sup> And where packages were delivered to an expressman in charge of an express wagon bearing the name of the express company, the wagon being one that called at plaintiff's place every night for goods to be delivered, the expressman signing a receipt on a form used by the company, it was held that the expressman had authority to act for the company in receiving the goods, and the delivery was sufficient.<sup>19</sup>

§ 437. — **Facts relied upon to show apparent authority must be clear.**—While apparent authority is usually sufficient, the facts upon which it is claimed must be clear and conclusive and of such a nature as to convince the ordinarily prudent business man that the authority is really possessed by the person acting as the agent of the carrier. If the facts relied upon are not sufficient to support such a belief, then delivery to one not having authority would not be sufficient.<sup>20</sup> The delivery must be to the carrier or to an agent having actual or apparent authority to act, and not to a mere servant, or a deck hand upon a steamboat,

<sup>18</sup> *Express Co. v. Black*, 8 Tex. Civ. App. 363.

<sup>19</sup> *Lewis v. Vanhorn*, 53 N. Y. S. 446, 24 Misc. Rep. 765. And in *Goodrich v. Thompson*, 44 N. Y. 324, it was held: "If an agent (a clerk), authorized by the general mode in which the business of his principals (forwarders) is conducted, to make a general contract in the ordinary course of the business, assumes to make a special contract with a third person, who has no notice of any limitation of the authority of such agent, the principals, as between themselves and such third person, are bound by the contract so made."

<sup>20</sup> *Abram v. Platt*, 52 N. Y. S. 153, 23 Misc. 637. It appeared that "the plaintiff, a regular customer of the defendant express company, exhibited the usual card indicative of his wish to ship goods, and in apparent response

thereto a man wearing a badge with the name of the defendant company entered plaintiff's store, receipted for the goods and took them away. The receipt thus signed was in a book of blanks which the company had furnished to plaintiff. At the time of this delivery a wagon was seen across the street on which the name of the company appeared, but the man was not seen to come from it or return to it, and it was not shown to have belonged to the company. The man was not the one who usually called for goods, and had never been seen before at plaintiff's store. Held, in an action to recover the value of the goods, which were never delivered, that the evidence failed to show that the man in question was defendant's agent, and that the complaint should have been dismissed."

or a brakeman upon a railroad train, or a switchman at the station, for these persons have no authority to receive goods for shipment.<sup>21</sup> Where one delivered a coat to a stage driver to be carried and delivered to another place and asked that it be put in the waybill, but the driver objected, that he had no authority to do so, but would carry it to the next station and have the agent of the company put it in the bill, it was held that this was not a sufficient delivery to the carrier, and that he could not be held liable for the loss of the coat.<sup>22</sup>

§ 438. **Agents authorized to receive.**—It may be said that the agents that are ordinarily authorized to receive freight for the common carrier for transportation are officials at railroad stations; such as station agents, receiving clerks at the freight-room, draymen of railroad companies, express companies or steamboat companies who are employed to solicit or receive freight at the business houses or other places about the city or town where they do business; agents of steamboat companies, or shipping clerks at their offices and freight rooms, captains or mates of vessels where the custom of the company has been to allow them to receive shipments, baggage-masters of connecting carriers, and officers and agents of such carriers, and servants of the different carrier companies employed by such companies to solicit and receive freight for transportation for their respective carriers.<sup>23</sup>

§ 439. **Constructive delivery.**—Thus far we have treated of actual delivery. Delivery may be actual or constructive, but constructive delivery of goods so as to bind the carrier and subject him to liability for their loss or injury will only be recognized as sufficient in cases where, by the constant and usual practice and usage of the carrier, such kind of delivery has been permitted. If it has been the usual practice of the carrier—for example, to receive goods delivered for shipment that are

<sup>21</sup> *Young v. Can. Pac. R. Co.*, 1 Manitoba L. 205; *Butler v. Hudson River R. Co.*, 3 E. D. Smith (N. Va. 424.

<sup>22</sup> *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388; *Fisher v. Geddes*, 15 La. Ann. 14. In *Trowbridge v. Chapin*, 23 Conn. 595, a trunk was delivered to one who was shown

to be a deck hand. It was held that the servants of defendant had no general authority to receive goods for transportation. *Porter v. Chicago R. Co.*, 41 Iowa, 358.

<sup>23</sup> *Witbeck v. Schuyler*, 44 Barb. (N. Y.) 469; *State v. Frew*, 24 W. Va. 424.



left by the shipper upon the platform of their depot, or the dock from which their ships are loaded, from all or from certain of their patrons, then such a delivery would be good and sufficient to bind the carrier. But if there is no such custom or usage or continued practice from which such acquiescence of the carrier in like cases can reasonably be inferred, then such delivery will not be sufficient.<sup>24</sup> Where a warehouse receipt for the goods was delivered to the carrier, and the goods to be transported by him were, before being removed from the warehouse, destroyed by fire, it was held not to be such a delivery as would create the extraordinary liability which usually attaches to the common carrier.<sup>25</sup>

<sup>24</sup> *Witzler v. Collins*, 70 Me. 290-299, 35 Am. Rep. 327, held there can be no constructive delivery of goods so as to bind the owner for their carriage except at such places where by constant practice and usage they have received property left for transportation. That can only be when by the constant practice and usage of the carrier he receives property left for transportation at a particular place. Citing 1 Chitty on Car. 636, note.

<sup>25</sup> *Stewart, Ralph & Co. v. Gracy & Bro.*, 93 Tenn. 314-320. The court say, "A contract with a common carrier for the transportation of property being one of bailment, it is necessary, in order to charge him for its loss, that it be delivered to and accepted by him for that purpose. But such acceptance may be actual or constructive. If, for instance, the property be deposited at a designated station, in accordance with a conventional arrangement between the parties in respect to the mode of delivery, or if it be deposited with a third person who is authorized by the carrier to execute a bill of lading in the name of the carrier, then such mode of

delivery is as complete as if the property had been actually deposited with the carrier." To this effect was *Deming v. Merchants'*, etc. Co., 6 Pick. 306. See also *Hutchinson on Carriers*, §§ 1, 79, 82; *Watson v. Railroad Co.*, 9 Heisk. 225." *Missouri Pac. R. Co. v. McFadden*, 154 U. S. 160: "The elementary rule is that the liability of the common carrier depends upon the delivery to him of the goods which he is to carry. This rule is thus stated in the text-books: 'The liability of a carrier begins when the goods are delivered to him or his proper servant authorized to receive them for carriage.' *Redfield on Carriers*, 80. 'The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other; and until it has become imposed upon the carrier by a delivery and acceptance he cannot be held responsible for them.'

**§ 440. Rules permitting constructive delivery must be applied with great caution.**—The aim and object of the law is to measure out to both the public and the carrier equal and exact justice. The public are to be served and furnished ample accommodations, at least to the extent of the ability of the carrier; on the other hand, the carrier should not be imposed upon by putting upon him unreasonable requirements, or subjecting him to liability by slack and unbusiness-like ways on the part of the shipper. As we have seen, constructive delivery depends very materially, if not entirely, upon the usage, custom and usual course of business of the shipper and the carrier. Has it been the long-continued, accepted course of business in the particular case to so deliver the freight, and has it been accepted by the carrier? Has the particular servant been allowed to so receive the freight for the carrier? Has freight, by the long, uninterrupted usage of the carrier with the particular shipper or with the public, been received and shipped when left at the particular place, by the roadside, or on the platform or dock, or when delivered to the captain or mate? If these questions can be af-

Hutchinson on Carriers, 82. This doctrine is sanctioned by a unanimous course of English and American decisions. *Schooner Freeman v. Buckingham*, 18 How. 182; *The Lady Franklin*, 8 Wall. 325; *The Delaware*, 14 Wall. 579; *Polard v. Vinton*, 105 U. S. 7; *Iron Mountain Ry. Co. v. Knight*, 122 U. S. 79; *Friedlander v. Texas & Pac. R. Co.*, 130 U. S. 423; *St. Louis, Iron Mountain, etc. R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 233; *Barron v. Eldridge*, 100 Mass. 455; *Moses v. Boston & Maine R. Co.*, 4 Fost. (24 N. H.) 71; *Brind v. Dale*, 8 Car. & P. 207; *Seway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, 3 Camp. 414; *Leigh v. Smith*, 1 Car. & P. 638; *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Exch. 330. Indeed, the citations might be multiplied indefinitely. Whilst the authorities may differ upon the

point of what constitutes delivery to a carrier, the rule is nowhere questioned that when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and the passing of the bill of lading, the carrier is not liable as carrier under the bill. Of course, then, the carrier's liability as such will not attach on issuing the bill in a case where not only is there a failure to deliver, but there is also an understanding between the parties that delivery shall not be made till a future day, and that the goods until then shall remain in the custody of the shipper." In *Green v. Milwaukee R. Co.*, 38 Iowa, 100, the court say: "It is not claimed that defendant would be liable without a delivery, either actual or constructive, of

firmatively answered according to the proofs, then, as we have seen, the delivery is sufficient. But great caution should be observed in determining these questions.<sup>28</sup>

the property to its agent or servant. That a delivery may be made at the proper place of receiving such baggage, under the express assent or authority of the carrier, without notice to its employees, will not, we presume, be disputed. It is equally clear upon principle that this assent may be presumed from the course of business or

custom of the carrier. Upon evidence of this character, contracts based upon business transactions are constantly established. The citation of authority is not required to support this position. See *Marriam v. Hartford & N. H. R. Co.*, 20 Conn. 354."

<sup>28</sup> Hutchinson on Carriers, § 93.

## CHAPTER IV.

### CARRIERS OF GOODS—FIXING THE LIABILITY OF THE CARRIER.

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| <p>§ 441. The object of the chapter.</p> <p>442. What must the carrier receive and carry.</p> <p>443. — Reasonable regulations.</p> <p>444. — Other legal excuses for refusing to receive goods.</p> <p>445. — Carrier may fix time and place for receiving.</p> <p>446. That the carrier has no facilities for carrying the goods.</p> <p>447. — Extraordinary occasions—Press of business.</p> <p>448. Carrier not permitted to arbitrarily refuse to receive and ship.</p> | <p>§ 449. Equitable proceedings to enforce the receiving and shipping of freight.</p> <p>450. Acceptance by the carrier.</p> <p>451. When delivery and acceptance completed.</p> <p>452. A bill of lading or receipt not a requisite to bind carrier.</p> <p>453. Action for refusal to accept and transport goods.</p> <p>454. Tender of the goods and payment of freight.</p> <p>455. Who may sue.</p> <p>456. The liability.</p> <p>457. Duty to provide proper vehicles.</p> |
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§ 441. **The object of the chapter.**—The goods being delivered or offered by the shipper for carriage to the carrier suggests the questions as to what must he receive, and in case of refusal how can the duty be enforced. The discussion of these questions is the object of this chapter.

§ 442. **What must the carrier receive and carry.**—The general rule is that it is the duty of the common carrier to receive the goods and property of all who offer them for carriage and comply with the usual requirements. This general rule, however, is subject to many limitations, some of which have already been mentioned, notably one, that the goods and property must be of the kind that is within the line of business in which the carrier is engaged, or in the line of goods or property he holds himself out to carry, or which, from all the circumstances, the carrier is reasonably expected by the public to carry. He is a *quasi*-public servant, subject to the demands of the public, and the law and public policy will call upon him to at all times respond to such

demands if within the scope and line of his business as a carrier. He is thus subjected to the demands of the public, and is bound to carry, as a general rule, all the freight or property that is tendered to him for carriage and that is within the line of his particular business; there are however exceptions and limitations to these rules which are suggested by public policy as well as by the common judgment of men, and to meet some of these exceptions and limitations the carrier is permitted to make reasonable regulations as to the carriage of goods presented to him for transportation.

§ 443. — **Reasonable regulations.**—Reasonable rules and regulations may be made applicable to all departments of the business of the common carrier. For example, it has been held that he may make regulations as to the manner in which the goods presented for shipment shall be packed or prepared for shipment, and this rule seems entirely reasonable,<sup>1</sup> for it is not difficult to understand that it would be necessary and only just to the carrier that certain kinds of goods should be properly prepared for shipment. For example, the carrier may require that crockery or hardware shall be crated; that hay shall not be shipped loose but shall be baled; that furniture or machinery shall be put in racks; that money shall be put in sealed packages; that all goods and property shipped shall be properly marked and directed to the consignee and to the place of destination, and that animals shall not be transported except there be an attendant to care for them *en route*. And so it follows that the carrier may refuse to receive such like property for transportation unless the shipper has complied with these reasonable regulations.<sup>2</sup>

§ 444. — **Other legal excuses for refusing to receive goods.** And so a carrier may refuse to receive goods for shipment where the packages lead him to suspicion that they may contain dan-

<sup>1</sup> Hutchinson on Carriers, § 113; Union Ex. Co. v. Graham, 26 Ohio St. 595.

<sup>2</sup> In *Seasongood v. Tenn. & O. Tr. Co.*, 54 S. W. 193, it was held "that a steamboat carrier was liable for the loss by theft of goods temporarily stored in its warehouse upon its wrongful refusal to receive them for shipment, the

shipper having had no reasonable opportunity to make a safer disposition of the goods." And in the same case it was further held that where one whom a steamboat carrier had permitted to act as its agent in receiving freight for such a length of time as to justify the belief that he was an authorized agent wrongfully refused to re-

gerous or explosive articles which would expose the carrier or his servants to danger, if the shipper refuse to allow the carrier to make an examination and satisfy himself that the goods are fit for shipment. Indeed, it is held to be the duty of the carrier under such circumstances to become satisfied that the goods are not of a dangerous kind, unfit and dangerous to be handled by the servants of the carrier.<sup>3</sup> So if the goods are infected with contagious diseases, or if to receive or transport them would occasion a riot, or where the property is such that the law prohibits its being carried,<sup>4</sup> or where the goods are perishable and the carrier has no means of immediate transportation, in such cases he may refuse to carry the property, but should notify the shipper that he cannot carry it, that he may ship it by some other carrier, or dispose of it as he may see fit.<sup>5</sup> And so it has been held that where the line of road was under military control, the

ceive freight offered, the carrier cannot escape liability on the ground that he had no authority to receive freight for shipment."

<sup>3</sup> Nitro-glycerine Case, 15 Wall. (U. S.) 524; Boston, etc. R. Co. v. Shanly, 107 Mass. 568. In the Nitro-glycerine Case, above cited, the court say: "The case cited from the common pleas recognizes the right of the carrier to refuse to receive packages offered without being made acquainted with their contents when there is good ground for believing that they contain anything of a dangerous character. It is only when such grounds exist arising from the appearance of the package or other circumstances tending to excite his suspicion that the carrier is authorized, in the absence of any special legislation upon the subject, to require a knowledge of the contents of the packages offered as a condition of receiving them for carriage. *Crouch v. London & Northwestern R. Co.*, 9 Exch. 556; *Brass v. Braitland*, 6 El. & Bl. 485."

<sup>4</sup> Where by statute the importation of goods of a certain character is prohibited, as, for example, intoxicating liquors, the carrier may refuse to receive them, and it has been held that while the carrier was made liable by statute for carrying such articles, it would be no answer for him to allege that he had no right to refuse to carry goods tendered. *State v. Goss*, 59 Vt. 266, 59 Am. Rep. 706. In *Milwaukee Malt Extract Co. v. Chicago, etc. R. Co.*, 73 Iowa, 98, it was held that where the plaintiff had tendered to defendant for shipment a known intoxicating beverage which was labeled beer, and which the company refused, because of the laws of Iowa which prohibited the importation of intoxicating liquors, it was held that the action could not be maintained for such refusal, although the beverage may not have been intoxicating, the shipment having been marked beer.

<sup>5</sup> *Tierney v. New York Cent. R. Co.*, 76 N. Y. 305.

carrier would be excused from receiving freight to be transported over it, as he does not control the road;<sup>6</sup> or whenever for any reason the goods are unfit for transportation, or where the shipper refused to pay the compensation for transportation. But should the carrier accept the goods for transportation in cases where he might properly have refused to receive them, he will be held to have waived his reasonable and legal excuse for not receiving them, and thus become liable for any loss of or injury to the property, the same as in case of other goods; in other words, he will be held to have waived his special exemption from liability.<sup>7</sup>

**§ 445. — Carrier may fix time and place for receiving.**—When the goods have been received by the carrier for immediate transportation the extraordinary liability of a common carrier is at once fixed upon; there is, therefore, good reason for holding that the carrier should fix a proper time and place for the receiving of the goods and for releasing him from any liability in case the goods are not delivered. It is therefore considered to be a reasonable regulation that the shipper shall offer the goods at a reasonable time and place fixed by the carrier.<sup>8</sup> And where goods are not so offered, and such reasonable regulations not complied with, the common carrier is not liable for loss of or injury to the goods.

**§ 446. That the carrier has no facilities for carrying the goods.**—From the definition of a common carrier it will be noticed that this limitation is recognized: that he is only bound to carry goods to the extent of his ability. While this is true, there is, however, a very important duty laid upon the carrier by way of requiring him to equip himself for the business he has in hand; he must furnish equipment reasonably commensurate with the well-understood and apparent demands upon a carrier operating in the particular locality and in the particular line of goods in which he is engaged. The railroad operating a line of road through a populous manufacturing and agricultural country must have equipment that is reasonably and prop-

<sup>6</sup> *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *Illinois Cent. R. Co. v. Schwartz*, 13 Ill. App. 490.

<sup>7</sup> *The David & Caroline*, 5 Blatchf. (U. S.) 266; *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766; *Hutch. on Car.* § 117.

<sup>8</sup> *Cronkite v. Wells*, 32 N. Y. 247; *Louisville R. Co. v. Flannigan*, 113 Ind. 488; *Robinson v. Baltimore & O. Ry. Co.*, 129 Fed. 753.

erly demanded in order to handle the shipments of freight from such a country, and if after a reasonable time has elapsed the carrier fails to supply such equipment, and because of this a shipper is damaged, there can be no question that the carrier would be liable in an action for such damage;<sup>9</sup> and it has been held that the courts may compel, by *mandamus*, the carrier to furnish cars and facilities for the shipment of freight and property tendered for shipment. In *State ex rel. etc. v. Texas, etc. R. Co.*,<sup>10</sup> it was held: "While it is true that the court has no legal right to manage a railroad, or direct the details of its operation, or make contracts for the railroad company, it may issue a writ of *mandamus* to compel it to perform a duty clearly defined under the law." And therefore may compel it by *mandamus* to furnish cars and facilities to distribute poles along a telegraph line which is to run parallel and adjacent to the right of way of the railway company.

§ 447. — **Extraordinary occasions—Press of business.**—It is the ordinary requirements, and not the extraordinary, that measure the legal duty of the carrier to receive and transport the goods of all who call upon him and offer their goods for transportation. It has been said that "the amount of business ordinarily done by a railroad is the only proper measure of its obligations to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there should be an unexpected influx of business to the railroad, this obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered, so as to afford a reasonable amount of accommodation for all. While it may be difficult to lay down any general rule upon this subject, sufficiently accurate in its terms, to cover all business that may possibly occur, still we think it can be approximated by saying that its means of transportation must be so distributed at the various stations for receiving passengers and freight along the entire line of its road as to afford a reasonable amount of accommodation for all."<sup>11</sup> And so a railroad

<sup>9</sup> In *Ill. Cent. R. Co. v. Cobb*, 64 Ill. 128, it was held that the company was liable for a delay in the transportation of goods in consequence of lack of cars or other facilities unless it could show good cause for the delay. *Chi-*

*cago R. R. Co. v. Thrapp*, 5 Ill. App. 502.

<sup>10</sup> 52 La. An. 1850, 28 So. 284; *Inman v. Railroad Co.*, 14 Tex. Civ. App. 39.

<sup>11</sup> *State ex rel. v. C., B. & Q. R. Co.*, 71 Neb. 593, 99 N. W. 309;



company which is required to satisfactorily meet the ordinary demands upon it, to receive and carry the freight without delay that is offered, is not bound to receive freight which it cannot carry because of a temporary press and demand of business occasioned by some unusual and unlooked for occurrence which the carrier could not prevent. The carrier, under such circum-

Strough v. N. Y. Cent. etc. R. Co., 87 N. Y. S. 30. See notes, 61 C. C. A. 414; Ballentine v. M. N. R. Co., 40 Mo. 491-500. In Mich. Cent. R. Co. v. Burrows, 33 Mich. 6, it appeared that the plaintiff on the 10th of November, 1871, shipped four carloads of apples consigned to agents at Minneapolis; there the apples were consigned to the next carrier, November 17th, and arrived in Minneapolis November 22d, injured by frost while in transit. The action was for damages. It also appeared that the great Chicago fire occurring October, 1871, destroyed the tracks, freight-houses, depot and other facilities of the plaintiff and brought about a great demand for the shipment of goods for relief of the Chicago fire sufferers, and that these shipments were given preference to any other shipment; that on account of this the road was greatly blocked by an accumulation of freight, and for this reason the freight in question was delayed. The court held: "The law is not so harsh and unjust as to punish a common carrier who makes such a discrimination under the circumstances, but rather commends and approves what was done. While, therefore, it may be true, as a general proposition, that it was the duty of the company to forward freight in the order in which it was received, yet in this case there was a great public necessity

to which all general rules must bend, making it the imperative duty of the company to give relief goods a preference. 'The law itself, and the administration of it,' said Sir W. Scott (2 Dods. 323, 324) 'must yield to that to which everything must bend—to necessity. The law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases. In the performance of that duty it has three points to which its attention must be directed. In the first place it must see that the nature of the necessity pleaded be such as the law itself would respect, for there may be a necessity which it would not. A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature. Secondly, that the party who was so placed used all practical endeavors to surmount the difficulties which already formed that necessity, and which, on fair trial, he found insurmountable. I do not mean all the endeavors which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably

stances, however, should inform those bringing freight for carriage of his condition; that he is unable to carry without delay; and that if left the goods will have to wait their order for shipment and until other freight on hand for carriage is shipped, thus affording the shipper an option to leave the goods upon condition named or take them to another carrier.

§ 448. **Carrier not permitted to arbitrarily refuse to receive and ship.**—When the shipper has done all that by the law and the reasonable regulations of the company he is bound to do by way of delivering the goods for shipment, the carrier cannot arbitrarily refuse to accept and transport them. The law will assume that the freight is in his possession and control, and he will be held for its safe custody and shipment; and in such case if the carrier should refuse, and an action at law for damages would not be an adequate remedy, a court of equity could no doubt be successfully invoked and the carrier compelled to transport the goods.

§ 449. **Equitable proceedings to enforce the receiving and shipping of freight.**—A rule of law well settled in the law of carriers is that the carrier is not permitted to make unjust and discriminating preferences by way of receiving and transporting freight; the general rule is that all must enjoy the same privileges and be subject to the same proceedings. This applies to the matter of receiving the goods for shipment as well as to their transportation, and when the company makes unjust discriminations, and the shipper has no adequate remedy at law for the redress of such wrongs, a court of equity will take jurisdiction and by its decree determine the equitable rights of the parties. This question was before the court in the case of *Rogers Locomotive, etc. Works v. Erie R. Co.*<sup>12</sup> It was claimed on the part of the complainant that there was a combination between the railroad company and certain of its directors to or-

be expected from a fair degree of discretion and an ordinary knowledge of business. Thirdly, that all this shall appear by distinct and unsuspected testimony; for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation.' And it

is also said to be a general rule, admitting of ample practical illustration, 'that where the law creates a duty or charge, and the party is unable to perform it without any default in him, and has no remedy over, there the law will in general excuse him.'"

<sup>12</sup> 20 N. J. Ch. 379.

ganize the "Union Locomotive Express Company," with power to forward and carry locomotives and other property, and that by reason of this the shipping rates of the locomotives of the complainant were very much increased; that by the law granting defendant railroad their franchise, they were bound to receive and ship the locomotives of the complainant and others at a reasonable rate, which was very much less than the rate of shipment by the express company, claiming that there was an unlawful combination to increase the rates. The court said: "If the allegations of the bill are true, and they are supported by the affidavits annexed, and are not denied by answer or affidavit, they present a flagrant case of refusal to perform the duties imposed upon it by law, and for which its franchises were granted, by a corporation public in its object and almost such in its character. Railway companies have delegated to them as part of their franchises much of the sovereign power of the state, in consideration of their discharging part of what are the proper duties of the government, that is, providing the means of commerce and intercourse by constructing the roads which are the avenues of that commerce. . . . The injury to the complainant, too, is of that nature, that while there may be a remedy at law, as by recovery of damages for injury, yet is such that cannot be adequately relieved by suits for damages. It is continually recurring, and will require continued and repeated suits, and continued litigation, and the expenses of each suit would make the recovery of the excess paid an inadequate remedy."

After a thorough discussion of the question the court decreed that an injunction be issued to restrain the parties from in any way preventing or hindering the railroad company transporting complainant's locomotives.<sup>18</sup>

**§ 450. Acceptance by the carrier.**—As a general rule, the delivery of the goods must be followed by an acceptance, either actual or implied, upon the part of the carrier or his duly authorized agents. But it may be said that before this can occur, except in cases where constructive delivery may be made, the attention of the carrier or his duly authorized agents must be called to the delivery of the property. The acceptance, in other words, will not be said to have taken place unless there is knowl-

<sup>18</sup> *Stock Yard Co. v. Louisville R. Co.*, 67 Fed. 35, 31 U. S. App. 252.

edge upon the part of the carrier that the goods are delivered into his custody and control for transportation, or unless at least such facts and circumstances are brought to the attention of the carrier as would justify the conclusion that he ought to have known that the goods had been delivered. An acceptance by the carrier will, however, waive any defects in the manner of the delivery of the goods. Where a package was delivered to the agent of a stage-coach company at the postoffice where the stage was standing, and not at the office of the company, and was by the agent, when received, entered on the way-bill, the agent having previously directed the person who had the care of the package to bring it to the postoffice, and the package having been lost before reaching its destination, it was held the owners of the coach were liable to the owner of the package for its value, the delivery at the postoffice having been with the assent of their agent.<sup>14</sup>

§ 451. **When delivery and acceptance completed.**—The delivery to and acceptance of the goods by the common carrier at once fixes the liability of the carrier; the custody and control of the goods are transferred to him. Just when this change takes place is sometimes difficult to prove, but it may be generally said that when the shipper has done all that he can do to effect the shipment of the goods, and has released his possession and control by actual delivery or such constructive delivery as is legal and sufficient, then the delivery and acceptance is complete and the carrier's liability at once attaches.

§ 452. **A bill of lading or receipt not a requisite to bind carrier.**—A bill of lading or receipt from the carrier to the shipper, although it is usually given, and the course of business would hardly seem satisfied until such a bill or receipt had been delivered, is however, not a requisite to a full and complete delivery. It may be said that it is but the evidence of such a delivery; but if no such receipt or bill has been delivered to the shipper upon the receipt of the goods for transportation, it may nevertheless be shown by parol proof that the goods have actually been delivered and the carrier has actually received them for shipment;

<sup>14</sup> *Phillips v. Earle et al.*, 8 Pick. 182. There must be acceptance. *Hutchinson on Carriers*, § 87; *Cronkite v. Wells*, 31 N. Y. 247. Acceptance may be actual or con-

structive. *Merriam v. Railroad Co.*, 20 Conn. 354; *Converse v. Transportation Co.*, 33 Conn. 166; *Green v. Railroad Co.*, 38 Iowa, 100.

and so well fixed and settled is this rule, that where by statute it was made compulsory upon the carrier to give to the shipper a receipt for the goods or a bill of lading, the delivery and acceptance being complete and no receipt or bill of lading having been given, it was held the carrier was liable.<sup>15</sup>

Where goods were delivered on board a vessel at New York to be carried to England, were receipted for, the receipt specifying the price of freight, but before bills of lading were executed, and before the ship sailed, she was burned with the goods on board without any actual negligence on defendants' part, the defendants were held liable as common carriers for the loss of the goods.<sup>16</sup> And where the shipper loaded goods into a car furnished by the carrier for the purpose of the particular shipment, the agent of the company assenting thereto, it was held that the goods were as much in the possession of the carrier as though they had been delivered at its warehouse for shipment. Such goods so delivered having been destroyed by fire before the bill of lading had been made out, the carrier was held liable; the liability having attached from the time of accepting the goods for transportation.<sup>17</sup>

And in *Shelton v. Merchants' Transportation Co.*<sup>18</sup> it was held that when goods were delivered to a carrier marked with the name and address of the consignee, the common-law liability attaches even though no contract or bill of lading was given the shipper. Upon the delivery of the goods in the warehouse of the carrier with the name of the consignee and place of destination, the agent of the carrier having notice of such delivery, and that it is for the purpose of transportation as marked, all

<sup>15</sup> *Montgomery & Co. v. Kolb*, 73 Ala. 396. Held, "while the statute makes it the duty of the common carriers to give a receipt for the merchandise delivered to them for transportation, their failure to do so cannot vary their liability if delivery is sufficiently shown." A master who receives goods on board his vessel and carries them to their destination subjects the vessel to the common-law liability of a carrier, though there is no bill of lading or other agreement entered into. *Brower*

*v. The Water Witch*, 4 Fed. Cas. No. 1,971. A carrier is liable for goods from the time they are shipped, although the bill of lading may be actually signed subsequent to the loss. *Snow et al. v. Carruth et al.*, 22 Fed. Cas. No. 13,144.

<sup>16</sup> *Lakeman v. Grinnell*, 18 N. Y. Sup. Ct. (5 Bosw.) 625.

<sup>17</sup> *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354; *Toledo R. Co. v. Gilvin*, 81 Ill. 511.

<sup>18</sup> 36 N. Y. Supp. Ct. 527.

is done that the shipper can do; the goods are in the possession and control of the carrier; they are actually, as we have seen, in transit, and the liability as common carrier attaches at once, and the mere failure or even refusal of the agent of the carrier to give and deliver to the shipper a bill of lading or a receipt for the goods will not relieve the carrier from liability at least for ordinary diligence;<sup>19</sup> but the receipt for the goods, or that part of the bill of lading which is held to be a receipt, given by the common carrier to the shipper on delivery of the goods, may be varied or even contradicted by parol proof. So, in case no goods were actually delivered, although a bill of lading was made out and delivered to the shipper, the carrier cannot be held liable upon it for the goods described or receipted in it.<sup>20</sup>

§ 453. *Action for refusal to accept and transport goods.*—This subject has already been somewhat considered,<sup>21</sup> but, in discussing the subject of delivery, the duty of the shipper in that respect, the accepting and transporting of property, it seems necessary to call attention to some requisites to the sustaining of an action for failure of the carrier to perform his duty. In order to sustain an action against the carrier for refusal to receive and transport the goods, it will at once occur to the reader that the following requisites on the part of the shipper and carrier must be observed: (1) A tender of the goods; (2) payment of the freight if demanded, and if not, an offer or willingness to pay; (3) an ability to receive and transport the goods.

§ 454. *Tender of the goods and payment of freight.*—It has been said that in order “to sustain an action against a railroad company for non-transportation of freight there must be evidence of a tender on the part of the plaintiff, or of a willingness

<sup>19</sup> *Afken v. Chicago, etc. R. Co.*, 68 Iowa, 363, 25 Am. & Eng. R. Cases, 377; *Cragin v. N. Y. Cent. R. Co.*, 51 N. Y. 63. “A shipper’s knowledge of directions to the carrier’s agent not to receive certain articles for transportation will not relieve the carrier from liability if their transportation is actually undertaken.” *Bennett v. American Trans. Co.*, 83 Me. 236.

<sup>20</sup> *National Bank of Commerce v. Chicago R. Co.*, 44 Minn. 224, 9

L. R. A. 268. “A carrier’s duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury from any source which may be averted, and which in the exercise of care and ordinary intelligence may be known or anticipated.” *Beard v. Ill. Cent. R. Co.*, 79 Iowa, 518, 7 L. R. A. 280.

<sup>21</sup> *Ante*, § 430.

to pay the customary price of such carriage. But it has been generally held that the payment of the freight is not necessary to sustain an action against a carrier for refusing to carry or delay in carrying freight unless it is required by the carrier."<sup>22</sup> But where an action was brought because of a refusal on the part of the carrier to transport coal, it was held that "a refusal of the carrier to transport the coal does not, in the absence of the actual tender of a definite amount for transportation, amount to a waiver of such tender so as to subject the carrier to liability for loss of business caused by relying upon such refusal."<sup>23</sup>

§ 455. **Who may sue.**—The action, as will be seen, must necessarily arise from the business transacted between the shipper and the railroad company. It is because of the refusal of the railroad company to receive the goods for transportation from the shipper that the suit is commenced; therefore it follows that the parties directly in interest are the shipper and the carrier; it is therefore the holding of the courts that the refusal of the carrier to take the goods for a particular consignee is in violation of an obligation to the shipper, and not to the consignee, and that an action therefor for damages by the consignee would not lie; that the proper plaintiff would be the shipper.<sup>24</sup>

§ 456. **The liability.**—The action, it will be remembered, is for refusing to receive and transport the goods. In this case the carrier does not receive the property into his custody and control. The property is merely left with the shipper; it would therefore follow that the extraordinary liability which the common law places upon the carrier could not attach in this case, for in order that the carrier be liable for the extraordinary liability, he must have received the goods into his custody and control; therefore the liability in such case is based upon the question of actual damage that results to the shipper by reason of the refusal to accept and transport the property.<sup>25</sup>

<sup>22</sup> *Galena & Car. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574.

<sup>23</sup> *Wilder v. Johnsburg & L. C. Ry. Co.*, 66 Vt. 636, 30 Atl. 41.

<sup>24</sup> *Lafaye v. Harris*, 13 La. Ann. 553.

<sup>25</sup> In *Cobb, Blasdel & Co. v. I. C. R. Co.*, 38 Iowa, 601, 630, the contention, among other things, was as to the measure of damages,

and it was held that the measure of damages against the carrier for a violation of his duty or contract in respect to the transportation of property should be such as to do justice and to award full compensation and no more to the party injured. And it was there held that the true measure of damage would be the difference

§ 457. **Duty to provide proper vehicles.**—After having received the goods for shipment it goes without saying that it is the duty of the carrier to furnish proper vehicles and proper conveyance for the transportation of the freight. Now, what would be proper vehicles is a question that must be determined largely by the class of freight that is to be shipped. If a railroad company is employed to transport railroad iron, a flat-car is a very proper vehicle; on the other hand, such a car would be very inappropriate if the freight were bales of hay or kegs of powder, and in this connection the times and customs of the times will have something to do with the question. In these days of refrigerator cars it would not be expected that a carrier would be excused if loss occurred on account of shipping dressed beef a long distance in a common car, or in a refrigerator car without ice. Or, if he is shipping fruit or other perishable property, if he fails to properly care for it, according to modern usage in that respect; and where strawberries were shipped from California to New York and Philadelphia in a refrigerator car that was furnished to the railroad company by a transportation company which agreed to keep the goods properly refrigerated, but failed to do so, and for lack of ice the berries were lost, it was held that the railroad company was liable, and the agreement of the transportation company could not be considered a defense.<sup>26</sup>

between the price paid for the goods and the price under their contract which was with the government, less the freight to the point of destination. *Bridgeman v. Steamboat Emily*, 18 Iowa, 510; *Jamison v. Gray*, 29 Iowa, 537; *Mich. Southern R. Co. v. Caster*, 13 Ind. 164; *Toledo, W. & W. R. Co. v. Roberts*, 71 Ill. 540; *Louisville, etc. R. Co. v. Flannigan*, 113 Ind. 488, 14 N. E. 307; *Ward's Cent. & P. Lake Co. v. Elkins*, 34 Mich. 439; *O'Conner v. Forster*, 10 Watts, 418; *Laurent v. Vaughan*, 30 Vt. 90.

<sup>26</sup> *New York, etc. v. Cromwell (Va.)*, 49 L. R. A. 462. The court say: "The California Fruit Transportation Company, for a consid-

eration, furnished its cars to the plaintiff in error. These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier, one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railroad company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the property of another. The undertaking of the plaintiff in error was to prop-



And so where butter was received for transportation from a point in Iowa to New Orleans, the butter was put in a refrigerator car by the company receiving it and afterwards put into a common box-car, the second company having no refrigerator cars. It was held that, notwithstanding this, the company was liable for the loss of the butter; the court saying, "a carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard it from destruction or injury by the elements, from the effects of delay, indeed, from every source of injury which he may avert, and which in the exercise of care and ordinary intelligence may be known or anticipated. Unknown causes, or those which are inherent in the nature of the goods, and cannot be in the exercise of diligence averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce when transported must be protected from rain, sunshine and

erly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which they were carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employees were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligation to care for the fruit that it would have been had the refrigerator cars belonged to it. For these reasons the judgment is affirmed." In *The Northern Belle*, 9 Wall. 526, the court discussed the modern manner of loading grain through conductors into the cars

or boats instead of putting it in sacks as was formerly done, the contention being in the case that, on account of the unseaworthiness of the barge and its unfitness for holding the cargo thus loaded, the wheat was damaged. It was held in this case that the carrier must know, at his own peril the condition of the vehicle in which he carries the goods of the shipper, for the reason that the shipper of the cargo is under no obligation to look after this matter, and he has no means of obtaining any positive information if he should attempt it; that it is the duty of the carrier to furnish a vehicle which is entirely adapted to the particular work; and when from any cause it is not fit or not adapted to the carrying of goods, and damage results, the carrier will be liable.

heat, and must have cars fit for their safe transportation. Live animals must have food and water when the distance of transportation demands it. Fruit and some other perishable articles must be carried with expedition and protected from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight bills, or by other papers accompanying the shipment. In the case before us, the marks on the baggage and the way-bill disclosed that the subject of the shipment was butter. The employees of defendant were endowed with intelligence which taught them that the season was summer, when warm weather prevailed; that butter in common cars would be greatly injured by the ordinary heat of the climate, and that the butter as it approached its destination would be subject, by reason of the change of latitude, to greatly increased heat from the weather. All of these things are familiarly known to all men. Surely, the law will presume that defendant's employees had full knowledge thereof. The law required the defendant, having received the perishable cargo involved in this suit, to exercise the care and diligence necessary to protect it, and if improved cars for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying the butter."<sup>27</sup>

And so the obligation or duty would be the same upon the carrier in case it were necessary in the carrying of the goods to preserve them from frost; and in order that the carrier may meet these requirements, he must provide himself with vehicles that are appropriate for the carriage of the property he accepts for transportation, and if he is negligent in the providing of such vehicles and such improved facilities, he will be held liable for any damage that may result because of such failure or negligence.

<sup>27</sup> *Beard v. Ill. Cent. R. Co.*, 79 Iowa, 510, 7 L. R. A. 280, citing numerous cases; *Hewett v. Chicago, B. & Q. R. Co.*, 63 Iowa, 611; *Sager v. Portsmouth, St. P. & E. R. Co.*, 31 Mo. 228; *Hawkins v. Great Western R. Co.*, 17 Mich. 62; *Railway Co. v. Pratt*, 22 Wall. 123; *Wing v. N. Y. & E. R. Co.*, 1 Hilt. (N. Y.) 241; *Merchants' Dispatch*

*Transp. Co. v. Cornforth*, 3 Colo. 280; *Hutchinson on Carriers*, § 294; *Steinway v. Erie R. Co.*, 43 N. Y. 123; *Boscowitz v. Adams Ex. Co.*, 93 Ill. 525; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262; *Helliwell v. Grand Trunk R. Co.*, 7 Fed. 76; *Paramore v. Western R. Co.*, 53 Ga. 385; *Dixon v. Richmond & D. R. Co.*, 74 N. C. 538.

## CHAPTER V.

### FIXING LIABILITY OF CARRIER—THE BILL OF LADING.

§ 458. Description and office of the bill of lading.

459. Its negotiability.

460. The consignor consigns goods to himself.

461. The bill of lading with draft attached.

§ 462. Bill of lading as proof.

463. — Authorities not entirely harmonious.

464. Conclusiveness as to condition, weight, contents or value.

465. By whom issued.

§ 458. Description and office of the bill of lading.—The bill of lading is both a receipt for the goods delivered for shipment, from the common carrier to the shipper or consignor, and a contract on the part of the carrier and the shipper that the carrier will transport the goods to their destination if on its road, and if not, that he will deliver them to another carrier if there is such an one, who will carry them to their destination. To the bill of lading are generally attached the limitations that the common carrier demands shall be a part of the contract. It is not necessary, in order to fix the liability of the carrier, that he shall issue to the shipper a bill of lading, but it is very important, as evidence of the acceptance of the goods delivered for immediate transportation and as showing when the relation commenced. This bill of lading also evidences very largely the duty and liability of the carrier as to the particular freight received for shipment while in transit, and his duty at the termination of the route. It is often issued in triplicate, a copy being kept by the carrier, the original given to the shipper, together with a copy either to be kept by the shipper or transmitted by him to the consignee. It is the original bill of lading that is the most important. This original is the bill that the common carrier will demand at the end of the route before the delivery of the goods.

The bill of lading has another important office, and that is as commercial paper or security. By it the carrier acknowledges that he has received from the owner or shipper the goods described for immediate transportation and that they are consigned to the person therein named as consignee; because of this

the bill of lading at once becomes valuable to the consignee, its value being coextensive with the value of the goods shipped; for the carrier by it acknowledges not only that he has the possession of the property for transportation, but that he is in duty bound to deliver the property named in the bill at its destination to the consignee therein named. The bill thus becomes an evidence of ownership of the consignee, coupled with the duty of the carrier to see that he receives the property; and so the consignee may use the bill of lading as property.<sup>1</sup>

§ 459. *Its negotiability.*—While the bill of lading is not negotiable as commercial paper, it may be transferred by indorsement so as to become, in the hands of the consignee or his order, a claim for the delivery of the property; that is to say, it is not commercial paper which will pass current as do promissory notes, or that class of commercial paper which passes by indorsement, but it is rather the title to the goods described in it that passes. It stands for the goods themselves and not for any particular amount of money. It is a claim for the delivery of the property from the carrier company; it is in the nature of a *quasi*-negotiable instrument. It is upon the theory that the common carrier can satisfy his contract and obligation only by delivering the property to the person or company who presents the bill of lading, and then only by following the instructions of the shipper that the carrier is bound to follow.<sup>2</sup>

§ 460. *The consignor consigns goods to himself.*—The shipper, in order to protect himself, often consigns the goods to himself, this giving him the privilege to control the delivery of the property at the end of the route; and it often becomes important in cases where goods are transported to be marketed at the termination of the shipment; or he may, of course, consign them to a third party. In either case it will become the duty of the common carrier to deliver the property according to the contract in the bill of lading and to the person named as consignee, or his order, and to no one else. And in order that the carrier may

<sup>1</sup> Cleveland, etc. R. Co. v. C. & A. Potts, etc., 33 Ind. App. 564, 71 N. E. 685; In re McElheney, 178 N. Y. 610, 70 N. E. 1102.

<sup>2</sup> Genson Co. Nat. Bank v. Nashville, etc. R. Co. (Tex. Civ. App., 1906), 79 S. W. 1094; Nat. Bank,

etc. v. Baltimore, etc. R. Co., 99 Md. 661, 59 Atl. 134; Haas & Co. v. Citizens' Bank (Ala. 1905), 30 So. 129, 1 L. R. A. (N. S.) 242; Kentucky, etc. Co. v. Bank, 28 Ky. Law Rep. 486, 89 S. W. 482.

protect himself, he may require that the original bill of lading shall be surrendered to him at the time he delivers the goods shipped.

§ 461. **The bill of lading with draft attached.**—This has come to be a matter of very great importance in the commercial world. The shipper, for greater security, at the time of obtaining his bill of lading for goods intended for the market at their destination, often consigns them to himself or order; he then attaches to the bill of lading a draft for the amount of money that he is to receive from the buyer with his indorsement upon the bill of lading which will obtain a delivery of the property; he sends the bill of lading, with the draft attached, to some bank in the city where the goods are to be delivered, with instructions to deliver the bill of lading to the purchaser upon payment of the draft attached. Or, if the goods are consigned to the purchaser, he may pursue the same course—attach the draft to the bill of lading, and transmit it to the bank with instructions that it be delivered upon the payment of the draft. Often, and generally, the shipper makes this draft through his home bank and thus obtains a credit at his home bank for the amount in advance. This manner of shipment and the collection at once shows to us the importance of the business, and the reasons for a strict compliance with the rules of law governing the transaction, and particularly the liability of the common carrier as well as the bank to whom the instructions are given as to the delivery of the bill of lading.<sup>3</sup>

<sup>3</sup> We here append a copy of the bill of lading made up with fictitious names and amounts; also a copy of the conditions that are usually printed upon the back of the bill. This bill of lading, with the conditions, is the bill of lading adopted by the Eastern Traffic Association. We also append a draft for the amount. The draft, as we have said, is usually attached to the bill of lading. It is the practice of some of the railroad companies to consign the goods to the consignor or order, which indicates to them that a draft is to be attached. The banks often adopt the stamping upon the draft itself of certain initials, as D. A. (meaning "draft attached"). With this bill of lading and draft attached are instructions forwarded to the bank not to deliver the bill of lading to the consignee until the draft is paid. As, for example, in the case made up by this bill of lading with draft attached, John Jones goes to his bank, the Detroit National, draws his draft on John Doe, the purchaser in New York, for the amount of the shipment, \$6,000, delivers the bill of lading to the Detroit National Bank, which attaches it to the draft and sends it forward to the bank upon which it is drawn,

to wit, "National Bank, New York," the consignor, taking credit at his home bank; or, if the home bank does not desire to give him credit for the amount, awaits the collection of the amount through the bank. If the goods are shipped with the draft drawn against the bill, the following form of bill is used:

MICHIGAN CENTRAL RAILROAD CO.

BILL OF LADING.

*Detroit, Mich., December 29, 1901.*

Received from owner by Michigan Central Railroad Company, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to the said destination, if on its road, otherwise to deliver to another carrier on the route to said destination.

It is mutually agreed, in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, both on the face and on the back hereof, and which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

Upon all the conditions, whether printed or written, herein contained, both on the face and on the back hereof, it is mutually agreed that the rate of freight from — to — is to be, in cents per 100 lbs:

If..Times First Class.	If First Class.	If Second Class.	If Third Class.	If Fourth Class.	If Fifth Class.	If Sixth Class.	If SPECIAL.	
							Class.	Rate.

And advanced charges at —, \$—.

Mark, Consignee and Destination.	Description of Articles.	Weight, Subject to Correction.
Shippers order. Notify John Doe, 54 Broadway, New York, N. Y.	Wheat 10,000 bushels More or less.	

SAMUEL JACKSON, *Freight Agent.*

NOTE.— Upon the back of this bill are printed certain conditions which we do not append.—  
AUTHOR.

The draft on the consignee, John Doe, which is sent through the bank for payment before the wheat is delivered by the carrier, may be as follows:

D. A.	\$5,000.	Detroit, Mich., December 12, 1901.
	One day after sight.....	Pay to the
	order of National Bank, New York,	
	Six thousand.....	Dollars.
	Value received and charge the same to account of	
	To John Doe, No. 1666. 54 Broadway, New York. }	John Jones. <sup>4</sup>

<sup>4</sup> Held, that the seller's delivery of bill of lading with draft attached, to plaintiff for discount, was for the purpose of transferring the right of possession of the

property as security for the draft and not for the mere purposes of collection, and that it had priority over an attachment levied after it was given. *Mather v. Gordon*, 77

§ 462. **Bill of lading as proof.**—The bill of lading is both a receipt for the goods delivered to the carrier and an agreement on the part of the carrier to transport the goods to their destination and deliver them to the consignee or his order. So far as the bill is a receipt for the delivery of the goods, it is subject to the law of evidence governing receipts and may be explained, modified or varied, or even entirely avoided, for fraud or mistake, and this by parol proof. But to the extent that it is a contract between the parties, as that the carrier will carry the goods to the place of destination designated in the bill and deliver them to the persons named, as the consignee or his order, or as to any other contract or stipulation contained in the bill, it is subject to the law of evidence governing written contracts and cannot be changed, altered or varied by parol proof. But where no goods were actually delivered to the carrier at the time of the issuing of the bill of lading, but through fraud and collusion the shipper and the agent of the carrier falsely represent that goods have been delivered, it has been frequently held that the carrier would not be liable for the goods described in the bill, and this though the statutes of the state forbid the issuing of a bill of lading unless the goods described in it were actually in the possession of the carrier at the time.<sup>5</sup>

*Pollard v. Vinton*<sup>6</sup> was a case where a bill of lading was made and delivered for a quantity of cotton in the usual form. The parties to whom it was delivered immediately drew a draft

Conn. 371, 59 Atl. 424; *Temple Nat. Bank v. Louisville, etc. Co.*, 26 Ky. Law Rep. 518, 82 S. W. 253.

<sup>5</sup> *St. Louis, etc. R. Co. v. Insurance Co.*, 139 U. S. 223; *The Wellington*, 1 Biss. 279. "A bill, so far as it is a contract, cannot be affected by parol, though subject to explanation as a receipt." *McTyre v. Steel*, 26 Ala. 487; *O'Brien v. Gilchrist*, 34 Me. 554; *Witzler v. Collins*, 70 Me. 290, 35 Am. Rep. 327. But where a bill of lading expressly provides that goods named therein may be carried on deck, parol evidence is inadmissible to show that the shipper

agreed that an additional portion of the goods should be so carried. *Seward v. Stevens*, 69 Mass. 97.

<sup>6</sup> 105 U. S. 7; *Robinson et al. v. Memphis, etc. R. Co.*, 9 Fed. 129. "The freight agent of a railroad company signed a bill of lading for thirty-two bales of cotton which were not on hand and were never delivered to the railroad company or any agent for it. The plaintiffs paid a draft for the price of the cotton on the faith of the bill of lading attached to it and indorsed to them, and never having received the cotton sued the railroad company for its non-delivery." Held, "that the carrier

on the plaintiffs in New York, payable at sight, with bill of lading attached, which draft was accepted and paid. No cotton was shipped on the steamboat or delivered on the wharf, or to its agent for shipment, as stated in the bill of lading, the statement to that effect being untrue. The plaintiff, upon whom the draft was drawn and the bill assigned, having paid the draft, brought suit against the owner of the steamboat. The court in its opinion say: "A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers applies to it only in a limited sense. It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver. To these elementary truths the reply is that the agent of defendant has acknowledged in writing the receipt of the goods, and promised for him that they should be safely delivered, and that the principal cannot repudiate the act of his agent in this matter, because it was within the scope of his employment. It will probably be conceded that the effect of the bill of lading and its

was not estopped to show that no cotton was in fact delivered for transportation; that the agent had no authority, real or apparent, to sign a receipt or bill of lading until actual delivery of the cotton, and the company was not liable."

Roy & Roy v. Northern Pac., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302, and notes; Anderson v. Portland, etc. Co., 37 Or. 483, 50 L. R. A. 235; Swedish-Am. Nat. Bank v. Chicago, etc. R. Co., 96 Minn. 436, 105 N. W. 69.



binding force on the defendant is no stronger than if signed by himself as master of his own vessel. In such case we think the proposition cannot be successfully disputed that the person to whom such a bill of lading was first delivered cannot hold the signer responsible for goods not received by the carrier. . . . Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one. They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped."

The court say, further, citing *The Schooner Freeman; Hickox v. Buckingham*:<sup>7</sup> "In that case the schooner was libeled in admiralty for failing to deliver flour for which the master had given two bills of lading, certifying that it had been delivered on board the vessel at Cleveland to be carried to Buffalo and safely delivered. The libelants, who resided in the city of New York, had advanced money to the consignee on these bills of lading, which were delivered to them. It turned out that no such flour had been shipped, and that the master had been induced, by the fraudulent orders of a person in control of the vessel at the time, to make and deliver the bills of lading to him, and that he had sold the drafts on which libelants had paid the money and received the bills of lading in good faith. A question arose how far the claimant, who was the real owner or general owner of the vessel, could be bound by the acts of the master appointed by one to whom he had confided the control of the vessel; and the court held that, having consented to this delivery of the vessel, he was bound by all the acts by which a

<sup>7</sup> 18 How. (U. S.) 182.

master could lawfully bind a vessel or its owner. The court in further discussing the question say: Even if the master had been appointed by the claimant, a wilful fraud committed by him on a third person, by signing false bills of lading, would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship, when in case of disaster, his power of sale arises. But the authority in each case, arises out of, and depends upon, a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act, in either case, does not bind the owner, even in favor of an innocent purchaser, if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition, upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends.”<sup>s</sup>

<sup>s</sup> It is said by the court in *Robins v. Memphis*, 9 Fed. 139, “these authorities establish beyond dispute that where a master signs a bill of lading for goods not received, or for more than are received, he acts beyond his authority, and the owner is not liable either to the original shipper or any consignee of the bill of lading, whether he makes advances on the faith of it or gives value

for it or not; neither is the owner estopped to show the facts as they really exist. Some courts have reluctantly yielded to this principle, and some have sought to restrict or qualify it in the supposed interest of commercial dealing; but in England, although a statute makes the individual signing the bill of lading liable, it goes no further, and the doctrine of *Grant v. Norway*, 10 C. B. 665, 70 Eng. C.

§ 463. — **Authorities not entirely harmonious.**—While it would seem that great weight of authority is as stated in the text and cases just cited, there is, however, a very respectable line of cases holding that where a third party, relying upon the statement of the carrier in the bill of lading, has invested his money by way of paying the draft attached to the bill, the carrier is estopped from denying the facts stated in the bill. These courts do not base their holding upon the negotiability of the bill of lading, but upon the ground of estoppel *in pais*.

The supreme court, in *Brooke v. Railway Co.*,<sup>9</sup> say: "As between principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested; but, as between the principal and

L. 664, has withstood the assaults upon it and is established law. It has been approved by the supreme court of the United States, and directly or in principle by other federal courts." *Vandewater v. Mills*, 19 How. 90; *The Lady Franklin*, 8 Wall. 325; *The Keokuk*, 9 Wall. 517-519; *Buckley v. Naumkeag Co.*, 24 How. 386, 392; *The Loon*, 7 Blatchf. 244; *The Edwin*, 1 Sprague, 477; *Relyea v. Rolling Mill Co.*, 42 Conn. 579; *King v. Shepherd*, 3 Story, 349, 360; *Hutchinson on Carriers*, §§ 123, 124; *Miller v. Railroad Co.*, 99 N. Y. 657; *Friedlander v. Railway Co.*, 130 U. S. 460; *National Bank v. Railroad Co.*, 44 Minn. 224. In *Gibbons v. Robinson*, 63 Mich. 146, the court held: "A bill of lading constitutes a contract between the parties thereto, and is evidence of the receipt of the goods, of their condition when received, of the contract of carriage, and to whom they are to be delivered. It is not, however, conclusive evidence of such receipt or condition between the owner and shipper, but so far as it is an undertaking to transport and deliver the goods as therein stipulated,

in the absence of fraud or mistake, its terms cannot be altered or varied by parol proof where it forms the basis or subject-matter of an action between the parties to the contract." *Pereira v. Cent. Pac. R. Co.*, 66 Cal. 92; *Bissell v. Price*, 16 Ill. 408; *Chapin v. Chicago, etc. R. Co.*, 79 Iowa, 582; *Kirkman v. Bowman*, 8 Rob. (La.) 246; *Atwell v. Miller*, 11 Md. 348, 69 Am. Dec. 206; *Meyer v. Peck*, 28 N. Y. 290; *Baltimore v. Brown*, 54 Pa. St. 77; *Glass v. Goldsmith*, 22 Wis. 488. But see *St. Louis & S. F. R. Co. v. Adams*, 4 Kan. App. 305, 45 Pac. 920, where the court held that railroad companies are estopped from denying the recitals in the bill that the consignment had in fact been received. Also *Smith v. Missouri Pac. R. Co.*, 74 Mo. App. 48, where it was held that as against a *bona fide* holder, where the bill of lading was issued by a railroad company, the company is estopped from denying that the goods were not actually received by the company.

<sup>9</sup> 108 Pa. St. 529; *Adams Exp. Co. v. Schlessinger*, 75 Pa. St. 246; *Evans' Agency*, 193, 594, 606.

the agent, the true limit is the express authority or instruction given to the agent. The principal is bound by all the acts of his agent within the scope of the authority which he held him out to the world as possessing, notwithstanding the agent acted contrary to instructions; and this is especially the case with officers and agents of corporations. Since a corporation acts only through agents, it is bound by its agents' contracts when made ostensibly within the range of their office. One who authorizes another to act for him in a certain class of contracts, undertakes for the absence of fraud in the agent who acts within the scope of his authority. The authority of an agent to act for and bind his principal will be implied from the accustomed performance by the agent of acts of the same general character for the principal with his knowledge and consent. These elementary principles are founded on the doctrine that where one of two persons must suffer by the acts of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in that matter, should be bound by it. It is conceded in this case that the company did not authorize the issuance of bills of lading without receipt of the goods, but it put the agent in its place to do that class of acts, and it should be answerable for the manner in which he conducted himself within the range of his agency. Public policy, as well as the ultimate good of corporations themselves, requires that this should be the rule."

In a case in the New York court, where bills of lading were issued for a quantity of lard consigned to the plaintiff, the consignor drawing upon the plaintiff with the bill of lading attached, and upon the faith of the bill of lading the drafts were paid, but no lard was ever received by the railroad company, the court held that, as the agent had authority to issue bills of lading for goods received for shipment, the bills in question being in the usual form, the agent must be considered as having the necessary authority.<sup>10</sup>

<sup>10</sup> *Armour et al. v. Mich. Cent. R. Co.*, 65 N. Y. 111. The court say: "They were issued with the expectation that they would be acted upon by bankers or other capitalists. It cannot complain if the bills accomplished the purpose

for which they were designed. The representations in the bills were made to any one who, in the course of business, might think fit to make advances on the faith of them. There is thus present every element necessary to con-

§ 464. **Conclusiveness as to condition, weight, contents or value.**—The carrier, it may be said, as a rule, is not supposed to know the condition of the contents of packages or boxes of goods brought to him for shipment; he can only determine that as to their external appearance they are in good condition, and so if their condition is found to have been otherwise on account of natural decay, or propensities of the goods delivered, that they have spoiled or wasted because of leakage, or on account of unskilful packing, or even that they were not in good condition at the time they were delivered, these facts may be shown and the carrier excused from liability. But if the loss or damaged condition was the result of the carrier's own negligence, and this fact can be shown, then of course he would be liable.

In *Richards et al. v. Doe et al.*<sup>11</sup> it was held "that a recital by the defendants in the bill of lading that the goods were received in good order and condition, though *prima facie*, is not conclusive evidence that the goods were free from internal injuries." The carrier may no doubt bind himself by the bill of lading so as to become liable as to weight or contents, or even value of the goods, but usually he excludes liability in this respect by words of limitation; that is, reciting in the bill of lading or the shipping bill that as to contents or the value of the goods, or weight, it is unknown. And so it may be said as a general rule, that, as between the original parties, the bill is merely *prima facie* evidence as to weight or quantity, and not conclusive, and that the carrier may show by parol evidence that

stitute a case of estoppel *in pais*, a representation made with the knowledge that it might be acted upon, and subsequent action upon the faith of it to such an extent that it would injure the plaintiffs if the representation was not made good. It is now well settled that fraud is not necessary to constitute a case of estoppel. Though the defendant was induced by the fraud or mistake of Michaels to issue these bills, that is immaterial. Its liability depends on the fact that, no matter what its inducements may have

been, it has made certain representations upon which the plaintiffs have advanced their money in good faith. If the defendant placed undue confidence in Michaels, it is but the familiar case of imposing the burden upon him who unwisely or unguardedly reposed the confidence." *Brown v. Bowen*, 30 N. Y. 519; *Mfg. & Traders' Bank v. Hazard*, id. 226; *Shapley v. Abbott*, 42 id. 443; *Rawls v. Deshler*, 4 Abb. Ct. App. 12; *Batavia Bank v. N. Y. R. Co.*, 106 N. Y. 195, 60 Am. Rep. 440.

<sup>11</sup> 100 Mass. 524.

a smaller quantity was actually received, or the shipper may show that the carrier received a larger quantity.<sup>12</sup>

§ 465. *By whom issued.*—The bill of lading may be issued by the carrier or his duly authorized agent. It is not necessary that there should be any particular form of appointment; the principles of the law of agency will apply. Ratification on the part of the carrier, knowing all the facts as to the acts of one claiming to act in behalf of the carrier, will be considered to be a sufficient appointment. The master of a vessel, because of the nature of his appointment, has been held to have authority to receive freight and issue a bill of lading therefor.<sup>13</sup> The person issuing the bill of lading must have authority to sign the carrier's name to the bill, for the bill must be signed by the carrier or some one by him duly authorized before it can have any binding effect.

<sup>12</sup> *The Lady Franklin*, 8 Wall. (U. S.) 325; *The Ethel*, 59 Fed. Rep. 473; *Strong v. Grand Trunk R. Co.*, 15 Mich. 206, *Ryder v. Hall*, 7 Allen, 456; *Meyer v. Peck*, 28 N. Y. 590; *Dean v. King*, 22

Ohio St. 118; *Chapin v. Chicago R. Co.*, 79 Iowa, 582, 42 Am. & Eng. R. Cases, 542.

<sup>13</sup> *Costello v. Laths*, 44 Fed. 195; *The Mary Bradford*, 18 Fed. 189.

## CHAPTER VI.

### LIABILITY AND LIMITATIONS UPON THE LIABILITY OF THE COMMON CARRIER.

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| <p>§ 466. Liability of the common carrier.</p> <p>467. Reasons for extraordinary liability.</p> <p>468. — Inanimate and animate freight.</p> <p>I. WHEN THE LOSS OR INJURY IS CAUSED BY THE ACT OF GOD.</p> <p>469. The act of God.</p> <p>470. Does not always excuse the carrier from all care.</p> <p>471. The act of God must be the conclusive and proximate cause.</p> <p>472. What will and what will not excuse—Summary.</p> <p>473. Burden of proof.</p> <p>II. BY THE PUBLIC ENEMY.</p> <p>474. The public enemy.</p> <p>475. The diligence required on the part of the carrier.</p> <p>476. Diligence, even though the property is injured or destroyed after the event has occurred.</p> <p>477. Strikers, rioters and robbers not the public enemy.</p> <p>III. WHERE THE LOSS OR INJURY IS THE RESULT OF THE ACTS OF THE SHIPPER.</p> <p>478. Reasons of the liability of the carrier.</p> | <p>§ 479. Contributory negligence.</p> <p>480. Improperly marking goods by the consignor.</p> <p>481. Goods improperly marked or loaded.</p> <p>482. Neglect of the shipper to disclose contents or value.</p> <p>483. Loss from mistake or intermeddling on the part of the shipper.</p> <p>484. Negligence of the carrier.</p> <p>IV. WHERE THE LOSS OR INJURY IS CAUSED BY THE INHERENT NATURE OF THE GOODS.</p> <p>485. The exception.</p> <p>486. Animate freight.</p> <p>V. CARRYING OF LIVE STOCK.</p> <p>487. The exception applies.</p> <p>488. Michigan rule.</p> <p>489. The duty of the common carrier.</p> <p>490. Statutes of United States with reference to duties of the carrier.</p> <p>491. The shipper must deal fairly with the carrier.</p> <p>VI. WHEN THE LOSS OR INJURY IS OCCASIONED FROM THE EXERCISE OF PUBLIC AUTHORITY.</p> <p>492. The reasons for the exception.</p> |
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§ 466. Liability of the common carrier.—Common carriers belonging to the extraordinary class of bailments, and though many of the reasons in which their extraordinary liability had its origin have long since ceased to exist, nevertheless the extraordinary liability still continues with but slight variance.

The common-law liability of the common carrier of goods is that of an insurer against loss or injury of the property while in his custody or under his control as a common carrier, except (1) where the loss or injury is caused by the act of God; or (2) by the public enemy. To these exceptions, which have long been exceptions by the common law, the more modern adjudications have added three others: (3) when the loss or injury is the result of the acts of the shipper; or (4) caused by the inherent nature of the goods; or (5) from public authority.

§ 467. **Reasons for extraordinary liability.**—The reasons for the extraordinary liability were discussed by Lord Holt in the celebrated case of *Coggs v. Barnard*<sup>1</sup> in this language: “The law charges this person (the carrier), thus intrusted to carry goods, against all events but acts of God and of the enemies of the king. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc.; and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.”

Mr. Chief Justice Best, in *Riley v. Horne*,<sup>2</sup> commenting upon the foundation of the rule in its bearing upon the commercial interests of the country, said: “When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servants with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier’s servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward namely, that of taking all

<sup>1</sup> 2 Lord Raymond, 909.

<sup>2</sup> 5 Bing. 217.



reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not,—namely, the act of God and the king's enemies."

Judge Story, discussing the liability, says:<sup>\*</sup> "In questions, therefore, as to the liability of a carrier, the point ordinarily is not so much whether he has been guilty of negligence or not, as whether the loss comes within either of the excepted cases. Not but that, if the carrier is actually guilty of negligence, he will be liable for a loss, which otherwise might be deemed a loss by an inevitable casualty."

§ 468. — **Inanimate and animate freight.**—From the statement of the exceptions or limitations to the liability of the common carrier it will be noticed that the extent of the liability and the application of the rules of limitation must be largely affected by the kind of goods that are being transported. If the freight is inanimate it can be, and is, subjected to the entire control of the carrier; he can lay it away in his vehicle where he chooses, and to his will and desire in this respect there is no opposition or restraint. A load of grain in sacks may be piled into one of the carrier's cars or vehicles, and if well loaded, and there are no mishaps in the transit, the goods at the end of the journey will be found in the same place and in the same condition as when they started in transit; but if the freight is animate, very different results may be looked for. If, for example, it be a load of horses or cattle stowed into a car, they become nervous and discontented, and often injure each other. The very fact that they possess life is an added element of uncertainty in the safety of their transportation, and so much does this change the nature of the liability that some of the courts have held that live animals are not goods and merchandise, and that the carrier's liability in transporting them is not the extraordinary common-law liability; that this extraordinary liability that attaches in case of inanimate freight does not apply in case of animate freight. Upon this, however, there is a diversity of opinion, the weight of authority holding, as we shall see, that

<sup>\*</sup> Story on Bailm., sec. 492.

the liability is the extraordinary liability, limited only by the inherent nature of the freight.<sup>4</sup>

### SECTION I.

#### WHEN THE LOSS OR INJURY IS CAUSED BY THE ACT OF GOD.

§ 469. **The act of God.**—It is sometimes very difficult to determine what is and what is not the act of God. There has been a great deal of discussion among the courts and authors with reference to this subject. The definition that is perhaps as often used as any is that of Anderson. An act of God is defined to be “such inevitable accident as cannot be prevented by human care, skill or foresight, but results from natural causes, such as lightning tempest, floods and inundations—something superhuman, or something in opposition to the act of man.”<sup>5</sup>

The supreme court of the United States, in *The Majestic*,<sup>6</sup> have quoted with approval Chancellor Kent: “‘The act of God,’ said Chancellor Kent, ‘means inevitable accident, without the intervention of man and public enemies;’ and again, that ‘perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. It is a loss happening in spite of all human effort and sagacity.’ The words ‘perils of the sea’ may, indeed, have grown to have a broader signification than ‘the act of God,’ but that is unimportant here.” And further, from Judge Parsons: “the ‘act of God’ is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the

<sup>4</sup> “The liability of a common carrier of goods is that of an insurer, and in cases of loss no excuse avails such carrier unless occasioned by the act of God or public enemy.” *Central R. Co. v. Lippman*, 110 Ga. 665. Common carriers of freight are liable for any damage not caused by the act of God or the public enemy, and are insurers. *Grand Rapids & Ind. R. Co. v. Huntley*, 38 Mich. 537; *Reed v. Wilmington Steamboat Co.*, 40 Atl. 955 (Del.). Where a

railroad company, for an agreed compensation, undertakes to carry goods and deliver them at destination, it is responsible for their loss irrespective of liability as a common carrier. *Trimble v. New York Co.*, 57 N. Y. Sup. 437.

<sup>5</sup> *McHenry v. Philadelphia R. Co.*, 4 Harr. (Del.) 449; *Chicago, etc. R. Co. v. Sawyer*, 69 Ill. 289; *And. Dic.* 23; *Express Co. v. Jackson*, 92 Tenn. 326.

<sup>6</sup> 166 U. S. 375.

common carrier, the dangerous and difficult question whether he actually had any agency in causing the loss; for, if this were possible, he should be held." And so an unprecedented flood by reason of which the baggage of a passenger was swept away was held to be an act of God.<sup>7</sup> And in *Long v. Pennsylvania R. Co.*<sup>8</sup> it was held that the Johnstown flood in 1889, which was of such extraordinary character that a party was not bound to anticipate or provide against it, and which came with such suddenness and power that escape from it was impossible, was an inevitable accident or act of God in respect to the loss of baggage on a railroad train where the utmost care was exercised by the agents and employees of the carrier to escape the dangers of which they had knowledge or reasonable grounds of apprehension.

§ 470. Does not always excuse the carrier from all care.—While the act of God, or such inevitable accident as is defined to be the act of God, will exempt the common carrier from the extraordinary liability that the common law imposes upon him in case of loss or injury of the property, it cannot be said to be an absolute excuse for all care or diligence upon the part of the carrier. If the goods are entirely destroyed by reason of the act of God, and the destruction was occasioned where there was no possibility of escaping the result, or any portion of it, it might be said that the defense would be a complete defense to an action against the carrier; but if the destruction is not total, then, while the carrier may be excused from the same liability, the law imposes upon him the duty of using ordinary diligence in preserving and caring for the property that is not entirely destroyed and is still in his custody. As where a shipper shipped with the plaintiff a carload of hogs, and the train upon which the car was being drawn was blocked by a snow storm, and detained upon the track for some time, during which time sixteen of the hogs died, it was held that while the train was undoubtedly detained by reason of the act of

<sup>7</sup> *Wald v. Pittsburg R. Co.*, 162 Ill. 545, 35 L. R. A. 356.

<sup>8</sup> 147 Pa. St. 343, 14 L. R. A. 741. A storm or freshet, to constitute an act of Providence, need not be unprecedented, if it is unusual, extraordinary and unexpected. *Peo-*

*ple v. Utica Cement Co.*, 22 Ill. App. 159; *Bowman v. Teall*, 23 Wend. 306; *Parsons v. Hardy*, 14 Wend. 215; *Harris v. Rand*, 4 N. H. 259; *Crosbey v. Fitch*, 12 Conn. 410.

God, notwithstanding this fact it was the duty of the carrier to exercise ordinary care in taking care of the property under all circumstances,<sup>9</sup> and if he failed to do so, was liable for the loss resulting therefrom.

§ 471. The act of God must be the conclusive and proximate cause.—If the loss or injury was the result in the slightest degree of any human action, or any admixture of human means with that which is determined to be the act of God, in such case the carrier could not be excused but would be held to the extraordinary liability. If the carrier has been guilty of any previous negligence or misconduct which would bring the property in contact with the destructive force of the *actus Dei*, or unnecessarily expose it thereto, he would not be exempt from liability; the loss or injury must have been occasioned by the direct and exclusive cause,—the act of God,—in order to exempt the carrier. Where the plaintiff brought suit against the railroad company alleging the loss of his trunk upon a train destroyed in the Johnstown flood, while it was held that the Johnstown flood was unquestionably an act of God and that the trunk was destroyed by reason of it, still, the court further held that if the trunk had gone upon the same train with the passenger, the plaintiff, and the train it should have been put upon, it would have passed where the flood occurred before it happened, and thus the property would not have been destroyed; holding, therefore, that the loss was not entirely the result of the act of God, but was probably caused by human acts.<sup>10</sup> And in a case where a car was blown over by a furious wind, and the goods

<sup>9</sup> *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197, 46 N. W. 428; *Smith v. Railroad Co.*, 91 Ala. 455.

<sup>10</sup> *Wald v. Railroad Co.*, 162 Ill. 545; *M. C. R. Co. v. Curtis*, 80 Ill. 324; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *McGraw v. Baltimore & Ohio R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696; *Bibbs, etc. Co. v. Atchison, etc. R. Co.*, 94 Minn. 269, 69 L. R. A. 509. Where goods overtaken and damaged by an act of God on account of carrier's negligent delay in shipping, carrier liable. Question fully briefed in 69 L. R. A. 509; *Green Wheeler Shoe Co. v. Chicago, etc*

*R. Co.*, 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882. In this case nearly every important decision bearing on the question is cited in briefs and opinions. *Alabama, etc. R. Co. v. Quarles* (Ala. 1906), 40 So. 120, 5 L. R. A. (N. S.) 867; *Central Ga. R. Co. v. Hall*, 124 Ga. 322, 4 Am. & Eng. Ann. Cases, 128-135, and notes. Where by delay the carrier brought the goods into the path of the flood, he cannot defend that the goods were destroyed by the act of God. *Elam v. St. Louis, etc. R. Co.*, 117 Mo. App. 453, 93 S. W. 851.

in the car afterwards and almost immediately destroyed by fire, it was held that the jury might properly find that the failure of the carrier to rescue the goods from the car which had been overturned by the force of the wind before they were consumed by fire was not negligence, where the evidence shows that the wind was so strong as to render it almost impossible for men to stand or walk, while the air was so full of dust and flying material that scarcely anything could be seen, and that the fire succeeded the overturning of the car almost instantaneously, so that even a messenger within the car escaped with great difficulty.<sup>11</sup>

§ 472. **What will and what will not excuse—Summary.**—So it may be said that the carrier will be excused beyond question where the loss was occasioned solely by the act of God; such as sudden inundation, lightning, fire by lightning, landslides, tornadoes, or wind storms, earthquakes, snow storms and rain storms, but that he will not be excused where the fire is not caused by lightning but originated from some human agency or negligence, nor will he be excused even where the fire is blown along by a wind which sometimes arises and drives it upon the property which it destroyed; nor by explosion of steam boilers, although it is necessary that steam boilers shall be used for propelling the boats and drawing the vehicles of the carrier; nor by collisions, even though the collision may have happened because of dense fog, or by reason of a tempest, or by severe storm; the theory being that wherever human activity has a part in that

<sup>11</sup> Blythe et al. v. Denver, etc. R. Co., 15 Colo. 333, 11 L. R. A. 615; Davis v. Wabash, etc. R. Co., 89 Mo. 349; Chidister v. Consolidated Ditch Co., 59 Cal. 202. Where human agency intervenes, the act of God cannot be sustained as a defense; as where a steamer was sunk by running into a mast of a sloop sunk a day or two previously; the squall which sunk the sloop was too remote. Merritt v. Earle, 29 N. Y. 115. "Any act or omission on the part of the carrier contributing to the loss takes away the protection of the defense that the loss was occasioned by

the act of God." Dibble v. Morgan, 1 Woods, 405. "The act of God which will excuse a common carrier must be the proximate and not the remote cause of the loss." King v. Shepherd, 3 Story, 356. "The act of God must not only be proximate but the sole cause of the loss." Wolf v. Am. Ex. Co., 43 Mo. 421. See notes to Hull v. Chicago R. Co., 41 Minn. 510, 5 L. R. A. 587; Insurance Co. v. Easton, 73 Tex. 167, 3 L. R. A. 424; Hartwell v. Northern Pac. Ex. Co., 5 Dak. 463, 3 L. R. A. 442; also notes, 11 L. R. A. 615.

which causes the destruction or injury; the carrier would be liable. As, for example, where the fire is blown by the wind, or where the boiler explodes upon the steamboat, or where the collision takes place in a fog, the boat or the vehicle is managed and under the care of human agency, and the loss or injury cannot be said to be caused by the act of God.<sup>12</sup>

§ 473. **Burden of proof.**—If the carrier relies for his defense upon this excuse, the burden of proof is upon him to make out his defense, having the affirmative of that issue.<sup>13</sup>

## SECTION II.

### BY THE PUBLIC ENEMY.

§ 474. **The public enemy.**—The public enemy, or, as it is called in the English cases, the king's enemies, may be defined to be enemies with whom the nation is at war, including also robbers or pirates upon the high seas. From this definition it will be understood that it does not include insurgents or those in rebellion with the state or nation, nor strikers, robbers or marauding bands of thieves, but rather presupposes that they must be the soldiers or armies of one or more of the governments among the powers, as a nation or independent government. Revolution, however, may grow to such proportions that it dominates the government and country where it exists, that is, becomes the ruling power, as did the revolutionists of the American colonies, and, as such, force recognition by other nations. The revolution of the states which brought on the war of the rebellion forced the courts of our own country to recognize their captures and destruction of property as coming within the exception, although such recognition was conceded with great reluctance. In the case of *Mauran v. Insurance Co.*,<sup>14</sup> the question was very ably discussed by learned counsel in their briefs printed with the case, where authorities are cited, and by Justice Nelson, who rendered the opinion of the court. In the opinion is found this language: "Now, applying these

<sup>12</sup> *Forward v. Pittard*, 1 T. R. 33; *Hollister v. Nowlen*, 19 Wend. 234; *Blythe v. Railroad Co.*, 15 Colo. 333; *Hale v. N. J. S. N. Co.*, 15 Conn. 539; *The Northern Belle*, 9 Wall. 526; *Plaisted v. Naviga-*

*tion Co.*, 27 Me. 123; *Nashville, etc. R. Co. v. Jackson*, 6 Heisk. 271; *Nashville, etc. R. Co. v. King*, 6 Heisk. 269.

<sup>13</sup> *Story on Bailm.*, sec. 492.

<sup>14</sup> 6 Wall. 1.

principles to the case before us, it will be seen that the question is not whether this so-called Confederate government, under whose authority the capture was made, was a lawful government, but whether or not it was a government in fact, that is, one in the possession of the supreme power of the district of country over which its jurisdiction extended? We agree that all the proceedings of these eleven states, either severally or in conjunction, by means of which the existing governments were overthrown and new governments erected in their stead, were wholly illegal and void, and that they remained after the attempted separation and change of government, in judgment of law, as completely under all their constitutional obligations as before. The constitution of the United States, which is the fundamental law of each and all of them, not only afforded no countenance or authority for these proceedings, but they were, in every part of them, in express disregard and violation of it. Still, it cannot be denied but that by the use of these unlawful and unconstitutional means a government, in fact, was erected greater in territory than many of the old governments in Europe, complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources, in men and money, to carry on a civil war of unexampled dimensions; and during all which time the exercise of many belligerent rights were either conceded to it, or were acquiesced in by the supreme government, such as the treatment of captives, both on land and sea, as prisoners of war; the exchange of prisoners; their vessels captured recognized as prizes of war, and dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers the same as in open and public war.

“We do not inquire whether these were rights conceded to the enemy by the laws of war among civilized nations, or were dictated by humanity to mitigate the vindictive passions growing out of a civil conflict. We refer to the conduct of the war as a matter of fact for the purpose of showing that the so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling or supreme power of the country, and hence captures under its commission were among those excepted out of the

policy by the warranty of the insured.”<sup>12</sup> Robbers or pirates upon the high seas are adjudged to be the public enemy upon the theory that they are the enemies of all mankind, and so the enemies of every nation.

§ 475. **The diligence required on the part of the carrier.**—In this, as in the case where the act of God is claimed as an exemption from liability, the common carrier is held to at least ordinary diligence in avoiding the loss of or injury to the property; and where, by negligence upon his part, there is a delay which would result in the destruction or injury of the property, even though it were by the public enemy, or where by his negligence there was a deviation in the route which would carry the property unnecessarily into a country invested by the armies of the enemy, and the property was destroyed or injured by them; in all such cases the common carrier would be liable, and could not successfully invoke the defense that the injury or destruction was the result of the acts of the public enemy. And the same rule would apply in cases where the property was injured or destroyed by pirates upon the high seas. It is, in other words, the duty of the public carrier to exercise at least ordinary diligence; such diligence as an ordinarily prudent man, under just such circumstances, would use with reference to his own affairs.

§ 476. **Diligence, even though the property is injured or destroyed after the event has occurred.**—And in this as in the cases already discussed under the act of God, it is the duty of the carrier to exercise ordinary diligence in caring for the property that is injured, though the injury occurred by reason of acts of the public enemy. He must do all that he can to take care of the property that is saved from destruction, and even though it is injured, he must care for all that would be of value to the

<sup>12</sup> The Prize Cases, 2 Black, 635; *Thorington v. Smith*, 8 Wall. 1; *Bland v. Adams Exp. Co.*, 1 Duv. (Ky.) 232. Chief Justice Robertson, in the opinion, uses this language; “War is either international or civil, foreign or domestic. Insurrection, however, violent or however formidable, is not war. Civil war is preceded by insurrec-

tion, which becomes magnified and matured into war in the legitimate sense, and when so characterized the parties are belligerents and entitled to belligerent rights.” *Frank v. Keith*, 2 Bush, 123; *Southern Exp. Co. v. Womack*, 1 Heisk. 256; *Fiefield v. Insurance Co.*, 47 Pa. St. 166.



shipper or his consignee; if by the use of such ordinary diligence valuable property could be saved or restored after the injury or destruction has occurred, it is the duty of the carrier to exercise that diligence, and it would be no defense for the carrier to show that, even though in the particular case he failed to exercise diligence, the property would have been destroyed on account of other like calamities that certainly would have overtaken it. 'As, for example, if the property, on account of unnecessary deviation from the usual route, was injured or destroyed even by the act of God or the public enemy, it would be no defense for the carrier to show that if the route had not been deviated, and the property had been carried upon the usual course, it would probably have suffered the same injury or destruction. The law, in other words, will not speculate and accept the theories and conclusions of men; in such a case the actual injury or destruction is the question that is to be adjudicated upon and adjusted, and where it has taken place under such circumstances the carrier must answer to the extraordinary liability that is required in his case.<sup>16</sup> Should it be a case, however, where there could be no question but that the property would have been destroyed had the carrier pursued the usual and regular course, and the deviation was dictated by ordinary judgment and prudence, but resulted in disaster by reason of the act of God or other reason which would ordinarily excuse the carrier, in such case it seems the carrier would be excused.<sup>17</sup>

**§ 477. Strikers, rioters and robbers not the public enemy.—**Strikers, rioters and robbers are not deemed to be the public enemy, and so their action will not relieve the carrier from the extraordinary liability which attaches to a common carrier of goods, except so far as to excuse deviation and delay. This seemingly severe rule as to the liability of the carrier seems to have had its origin in the very early opinion that the carrier should be held to meet such force with force; if attacked by rob-

<sup>16</sup> This was the discussion in the case of *Davis v. Garrett*, 6 Bing. 716.

<sup>17</sup> Story on Bailm., secs. 413a, 413b, 413c, 413d. The Nitro-glycerine Case, 15 Wall. 524, held the measure of care against accident

which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own.

bers, that he should have at his call sufficient force to meet and repel the attack.<sup>18</sup> More recently this rule, which seems to have generally prevailed in the earlier times, has been abandoned by the courts and the liability rested upon a different theory, namely, that of a probability of collusion between the carrier and third parties to defraud the shipper, unless deterred by severe rules and penalties, which seemed to be demanded by public policy.

Lord Mansfield in commenting upon this subject said: "If an armed force came to rob the carrier of the goods, he is liable; and a reason is given in the books which is a bad one, namely, that he ought to have sufficient force to repel it. But that would be impossible in some cases; as, for instance, in the riots of 1780 (the Lord George Gordon riots). The true reason is for fear it may give room for collusion; that the carrier may contrive to be robbed on purpose and share the spoils." And so it would seem that this rests upon the theory that seems to have originated the extraordinary liability itself, namely, to meet the possibility of the collusion of the carrier with robbers, rioters, strikers or thieves.

### SECTION III.

#### WHERE THE LOSS OR INJURY IS THE RESULT OF THE ACTS OF THE SHIPPER.

§ 478. **Reasons of the liability of the carrier.**—The limitation stated in the third general heading is one of the more recently added exceptions to the rule governing the liability of the carrier. The early rule of the common law excused the carrier from liability only in cases where the loss or injury was the result of an act of God or the public enemy; in all other cases he was an insurer. But to say that the carrier should not be excused when the injury or destruction of the property was the direct result of the shipper's own acts, or because of his own fraud, would be a travesty upon justice which the good judgment of men and that sense of right which all possess, would condemn, and condemning would demand a change so as to better comport with right and justice. So, growing out of the experience and well-balanced judgment of men, there has

<sup>18</sup> *Coggs v. Bernard*, 2 Lord Raymond, 909.

been added to this rule the just exception now under discussion: so when the loss or injury is the result of the acts of the shipper, the carrier will be excused from the extraordinary liability. Among the well-defined reasons for placing the carrier under the extraordinary liability amounting to an insurer of the property, is that he has the entire possession, custody and control of it throughout the entire time of transporting it. It therefore follows, that because he must bear this extraordinary liability, he has the right to insist that his custody and control shall be absolute and without interference; even by the owner or the shipper. Then, too, as we shall see, the shipper before placing the goods in the custody of the carrier might by some act of his own have impeded the facilities of the carrier, or in fact been the cause of his inability to transport the property with that safety that is required, and for such act upon the part of the shipper common justice and right would demand that the shipper and not the carrier should be liable.

§ 479. *Contributory negligence.*—As we have already seen, a very high degree of diligence in caring for and transporting the property is demanded of the carrier; even to the extent that in case of loss of the property his liability is held to be that of an insurer. Where, however, there are duties to be performed on the part of the shipper and the loss of the property is occasioned by his failure to perform these duties, or where any omission or negligent act of the shipper is a partial cause of the loss or injury, in connection with the duties to be performed by the carrier, it may be said that he has contributed to the loss or injury, and in such case, being himself guilty of contributory negligence, he would not be permitted to recover from the common carrier.

Where the owner of cotton placed it upon a platform for shipment, not leaving any watch, the cotton being destroyed by fire negligently set by the railroad company, it was held in an action against the railroad company for the cotton destroyed that it was not contributory negligence *per se* for the shipper to place the cotton on the platform.<sup>19</sup> This rule is undoubtedly based upon the theory that good faith and reasonable diligence from the owner in his dealings with the carrier are required. And so, where the owner of property accompa-

<sup>19</sup> St. Louis, A. & T. Ry. Co. v. Fire Ass'n of Phila., 55 Ark. 163.

nied it for the purpose of taking care of it, and the property was lost and destroyed through negligence of the owner in failing properly to care for it, it was held that he was not entitled to recover in an action against the carrier. The court, in delivering the opinion, said: "It is the right of the owner to commit his property to the exclusive custody of the carrier, and the latter has no right to decline to receive it; but if the owner sees fit to take upon himself any duty connected with the carriage, he does not lose his position as an independent party to the contract, and is bound to discharge it with fidelity." <sup>20</sup>

§ 480. **Improperly marking goods by the consignor.**—It is the duty of the shipper of goods to see that they are properly marked to their destination in order that the consignee of the property and the place where the shipment is to be made may be properly entered upon the books of the carrier. It has been held to be the duty of the owner of goods to have them properly marked and present them to the carrier or his servants that they may be entered in the books of the carrier, and if he neglects to do this, and there is a misdelivery and loss in consequence without any fault on the part of the carrier, the carrier will not be held liable for the loss.<sup>21</sup> But where the goods were incorrectly addressed, and the carrier's agent at the time he received them had knowledge of the error, it was held that the liability of the carrier could not be defeated upon the ground of contributory negligence of the owner, that the carrier, having knowledge of the error, should have acted upon that knowledge.<sup>22</sup>

§ 481. **Goods improperly packed or loaded.**—The duty of packing the goods for shipment, as, for example, in the case of

<sup>20</sup> *Wilson v. Hamilton*, 4 Ohio St. 722.

<sup>21</sup> *The Huntress*, 12 Fed. Cas. No. 6,914.

<sup>22</sup> *O'Rourke v. C. B. & Q. R. Co.*, 44 Iowa, 526; *Forsythe v. Walker*, 9 Pa. St. 148. An express package was misdirected by the consignors, in consequence of which it was delivered at a wrong place, and without default of the company was destroyed by fire. Held, that the company was not liable.

*So. Ex. Co. v. Kaufman*, 59 Tenn. (12 Heisk.) 161. And where fruit trees were missent by the carrier, the plaintiff having marked the goods Iuka, Iowa, without designating Tama county, there being two towns named Iuka in Keokuk county, it was held that the shipper was guilty of contributory negligence in marking the goods. *Conger v. Chicago & N. W. R. Co.*, 24 Wis. 157.

crockery or glassware, or other property which requires proper packing, usually devolves upon the shipper. As we have already seen, the carrier company may demand that the goods shall be properly packed and ready for shipment before it is compelled to receive them for transportation. It would therefore follow that where the goods were improperly packed, and for this reason injury or loss resulted, the carrier could not be held liable. So, it is often the duty of the shipper to load the goods into the vehicle of the carrier, and thus put them in readiness for shipment. And where the shipper loaded upon a platform car heavy machinery, and insufficiently blocked the wheels, by reason of which the machinery, while being transported by the defendant carrier, broke from its fastenings without any fault of the defendant in the running of the train, or in maintenance of the track, and was injured, it was held that the carrier was not liable therefor, although one of its servants, the yardmaster and forwarder of freight cars, saw the fastenings and noticed that they were insufficient. The court say in the opinion: "Had the fastenings been sufficient the accident would not have happened. Is the defendant chargeable with the consequences of that insufficiency? We think not, in the sense in which the county court seems to have regarded it. The undertaking and duty of the defendant was to transport and deliver safely against all contingencies except the act of God, public enemies, and acts of the parties shipping the property. It was the insurer against everything but those; but as against them, it was bound only to the exercise of reasonable care and diligence. In this case it undertook to transport the articles safely, in the condition in which the plaintiff had packed them, insuring against everything but that condition and its consequences, and bound to use reasonable care and diligence against injury resulting from that condition."<sup>23</sup> And so reason and justice dictate that if boxes in which goods are packed by the shipper for transportation should be broken upon the journey, and loss is thereby occasioned, and without any fault on the part of the carrier the goods are destroyed, the carrier could not be held liable.<sup>24</sup>

<sup>23</sup> *Ross v. Troy & B. R. Co.*, 49 Vt. 364.

<sup>24</sup> "The owner of a hogshead of molasses furnished a common carrier with skids wherewith to unload the same from his wagon; but the skids, owing to a latent

defect, broke under the weight of the hogshead and the contents thereof were lost. Held, that the owner could not maintain an action against the carrier for the loss." *Loveland v. Burke*, 120 Mass. 139, 21 Am. Rep. 507.

§ 482. **Neglect of the shipper to disclose contents or value.**—The neglect of the shipper to disclose to the common carrier the value of the package delivered for shipment may in some cases be considered as fraudulent upon the part of the shipper, and at least as not comporting with that reasonable rule which the law imposes upon the bailor that he shall deal fairly with the bailee. Cases have often been presented to the courts where valuable articles, and often money, have been stowed away in packages that were delivered for transportation, without apprising the carrier of the value of the package; the carrier, thus being misled, failing to exercise the high degree of diligence that he would have exercised had he known the contents of the package. In all such cases, if it can be shown that the owner of the property fraudulently secreted the valuable articles and intentionally kept the fact from the carrier, the courts have excused the carrier from the extraordinary liability. And, indeed, the authorities have gone so far as to hold that the intention to impose upon the carrier is not material; that it is enough if the conduct of the shipper resulted in an imposition upon the carrier. Where a party forwarded jewelry worth a large amount of money in a box by express, taking a receipt which disclosed on its face that the company should not be held liable for any loss or damage of any box, package or thing over \$50, unless the just and true value thereof was therein stated, and failed to state the value, and in consequence thereof was charged a less premium than otherwise would have been required, it was held that this conduct showed a designed suppression of the value of the goods, and that it was unfair on the part of the shipper of the goods, and that the effect of it was to relieve the carrier from his liability as insurer; that had the true value of the goods been disclosed, there would have been an extra charge, and increased precaution would have been taken for the safety of the goods, and that the goods on account of this would have been saved; that the consignor by his conduct elected to take the risk of the loss rather than to subject the plaintiff to the enhanced charges that would have been made had the value of the property been disclosed.<sup>25</sup>

The rule in this respect is thus laid down by the supreme court of New York: "If the carrier has given general notice that he will not be liable over a certain amount unless the value

<sup>25</sup> *Oppenheimer & Co. v. U. S. Exp. Co.*, 69 Ill. 62.

is made known to him at the time of delivery and a premium for insurance paid, such notice, if brought home to the knowledge of the owner (and courts and juries are liberal in inferring such knowledge from the publication of the notice), is as effectual in qualifying the acceptance of the goods as a special agreement, and the owner, at his peril, must disclose the value and pay the premium. The carrier in such case is not bound to make the inquiry, and if the owner omits to make known the value, and does not therefore pay the premium at the time of delivery, it is considered as dealing unfairly with the carrier, and he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice."<sup>26</sup>

And where valuable goods were delivered to the carrier, an express company, for carriage, the shipper remaining silent as to their real value, the carrier giving him a receipt stating among other things that if the value of the property described is not stated by the shipper, the holder will not demand of the company a sum exceeding \$50 for the loss or detention or damage of the property, it was held that a disclosure of the value of the goods was a condition precedent to the attaching of any liability to the carrier, or merely ordinary neglect unaccompanied with any misfeasance or wilful act; and that if goods of greater value are so delivered, silence on the part of the shipper as to the real value, although there is no inquiry and no artifice to conceal the value or to deceive, is a legal fraud which discharges the carrier from liability or ordinary negligence for an amount exceeding the limitation made by the carrier.<sup>27</sup>

"And where a shipper delivered to a carrier for transportation a bundle having the appearance of bedding only, but which in fact contained inside of the bedding valuable clothing, such as a silk dress, a brocha shawl and furs of the value of \$200 or more, which fact was not disclosed, and thereby shipped them at a low rate of freight, it was held that this was such an imposition and fraud practiced upon the carrier as to release him from

<sup>26</sup> *Orange Co. Bank v. Brown*, 9 Wend. 115; *Angell on Carriers*, sec. 245; *Farmers' Bank v. Champlain Trans. Co.*, 23 Vt. 186; *Western Trans. Co. v. Newhall*, 24 Ill.

466; *Hollister v. Nowlen*, 19 Wend. 244.

<sup>27</sup> *Magnin v. Dinmore*, 70 N. Y. 410; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185.

any liability for loss, except as to what might properly be termed bedding." <sup>28</sup> And where a package containing articles of a brittle nature is delivered to an express company to be transported from one point to another, and the company is not informed what the package contained, so that a degree of care may be used proportionate to its fragile character, the company will not be held liable to the extent of common carriers.

§ 483. **Loss from mistake or intermeddling on the part of the shipper.**—As has often been said, the liability of the carrier is based largely upon the fact of his possession and entire control of the goods shipped; and so, if the shipper intermeddles or is guilty of any unwarranted interference which occasions loss of or injury to the property, he must suffer for his own acts, and not the carrier. And so where an owner of a horse shipped the horse by placing him in a car and insisted that the door should be left open, and would not allow the servants of the carrier to shut the door of the car, saying that he would take care of the horse himself, and the horse, falling out through the door of the car, was injured, it was held that the common carrier was not liable for the injury to the horse; it was occasioned by the improper and unwarrantable interference of the plaintiff. <sup>29</sup> And in a case where a horse was injured by jumping through an open window in the car which was left open by the owner, it was held negligence upon the part of the owner, and recovery against the common carrier was not allowed. <sup>30</sup>

§ 484. **Negligence of the carrier.**—While for these reasons the common carrier is excused from the extraordinary liability, the rule obtains that was discussed under the other limitations, namely: where the injury or loss was occasioned by reason of the act of God or the public enemy, the carrier must at all times exercise at least ordinary diligence in caring for and transporting the injured property, if any, safely for the consignee to the destination of the shipment.

<sup>28</sup> Chicago, etc. R. Co. v. Shea, 66 Ill. 471; *Bottom v. Charleston, etc. R. Co.*, 72 S. C. 375, 5 Am. & Eng. Ann. Cas. 118, and see notes and cases cited at pp. 120-122. At page 121 of 5 Am. & Eng. Ann. Cas. the editor gives the reason

for the rule and cites numerous cases.

<sup>29</sup> *Roderick v. Railroad Co.*, 7 W. Va. 54.

<sup>30</sup> *Hutchinson v. C., St. P., M. & O. R. Co.*, 37 Minn. 524; *Congar v. Railroad Co.*, 24 Wis. 157.



## SECTION IV.

## WHERE THE LOSS OR INJURY IS CAUSED BY THE INHERENT NATURE OF THE GOODS.

§ 485. **The exception.**—This subject has been so often referred to in previous sections of this volume that it hardly seems necessary to discuss it here. It can be very readily seen that if the loss of the property is the result of the inherent nature of the goods or of the property being shipped, and is not the result of any fault of the carrier, it would be at least unjust to hold the carrier to an extraordinary liability, namely, as an insurer for the delivery of such property. As, for example, where the goods are perishable,<sup>31</sup> and because of unforeseen delay that could not be prevented by the carrier the goods have spoiled or become damaged, it would be unjust to hold the carrier in such case. Also in the case of liquids that evaporate. When the freight is inanimate, the loss or damage falling within this exception is such that no diligence however great on the part of the carrier could avert it, but is entirely attributable to the nature of the goods.

§ 486. **Animate freight.**—In connection with this exception belongs the discussion of its application to the carriage of animate freight. If the freight has life and activity it must of necessity introduce a new element into the question of the liability of the carrier. The fact that he is able by himself or his servants to absolutely control the freight, as he can if it is inanimate, materially adds to the reasonableness of the common-law rule that held the common carrier to the extraordinary liability as an insurer. There is no danger from the action of the freight itself. If it is inanimate it remains where it was packed or loaded or stored; it is only a matter of handling and transporting and delivering it. But where the freight is animate the carrier meets a very different condition. The freight is active, and added to the care of the property merely as freight, is the care that is required because of its life and activity.

<sup>31</sup> *American Ex. Co. v. Smith*, 33 Ohio St. 511. Peaches were shipped by the carrier. On account of a bridge being washed away by a freshet it was impossible to carry

them further; the carrier sold them for the best price obtainable. It was held that he was not liable, and discharged his duty in selling the property.

## SECTION V.

## CARRYING OF LIVE STOCK.

§ 487. **The exception applies.**—Good conscience and fair dealing demand that the rigorous rule of the common-law liability be modified in respect to the carrying of live stock; and so it has been held without dissent that where animals are injured or lost while in transit, and the damage or loss is not in any way attributable to the fault of the carrier, but is the result of the inherent nature, vice, condition or disease of the animals, the carrier should be excused from the extraordinary liability, and held answerable only for ordinary diligence which he must exercise in protecting the shipper so far as possible from loss.

The rule has been stated in a recent case as follows: "While a common carrier of goods, who transports live stock, is, as to the latter property, a common carrier, he is exempt from liability for loss or injury caused by the nature and propensities of the animals, and which cannot be prevented by foresight, vigilance and care."<sup>32</sup>

It has also been held in a well-considered case: "In the transportation of such stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation because they refuse to eat, or they may die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation and exercised that degree of care which the nature of the property requires."<sup>33</sup>

Where plaintiff shipped over the defendant's road a span of horses that had been driven together, and had been previously kind and well disposed, and it was found on arrival at their destination that one of them had been very badly kicked, although they had been tied in opposite corners of the car, it was said by the Massachusetts court in its opinion: "According to the es-

<sup>32</sup> *Cooper v. Raleigh, etc. R. Co.*, 110 Ga. 659.

<sup>33</sup> *Cragin et al. v. N. Y. Cent. R. Co.*, 51 N. Y. 61, 63; *Clark v. Rail-*

*road Co.*, 14 N. Y. 570; *Bissell v. N. Y. Cent. R. Co.*, 25 N. Y. 442; *Smith v. M. H. & N. R. Co.*, 12 Allen, 531.

established rule as to the liability of a common carrier, he is understood to guarantee that (with the well-known exception of the act of God and of public enemies) the goods intrusted to him shall seasonably reach their destination, and that they shall receive no injury from the manner in which their transportation is accomplished. But he is not, necessarily and under all circumstances, responsible for the condition in which they may be found upon their arrival. The ordinary and natural decay of fruit, vegetables and other perishable articles, the fermentation, evaporation or unavoidable leakage of liquids, the spontaneous combustion of some kinds of goods, are matters to which the implied obligation of the carrier, as an insurer, does not extend. He is liable for all accidents and mismanagement incident to the transportation and to the means and appliances by which it is effected; but not for injuries produced by, or resulting from, the inherent defects or essential qualities of the articles which he undertakes to transport. The extent of his duty in this respect is to take all reasonable care and use all proper precautions to prevent such injuries, or to diminish their effect as far as he can; but his liability, in such cases, is by no means that of an insurer. . . . They would be unconditionally liable for all injuries occasioned by the improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement, or want of due care, or by any other accident (not within the well-known exception) affecting either the train generally or that particular carriage. But the transportation of horses and other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or, notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other.”<sup>34</sup> And so it has been held, “where horses or other animals were being transported by water, and in consequence of a storm broke down the partitions between them, and by kicking each other

<sup>34</sup> *Evans v. Fitchburg R. Co.*, 111 Mass. 142, 143; *Story on Bailm.*, sec. 576.

some of them were killed, that the carrier would not be held responsible."<sup>25</sup>

The United States supreme court have held that "although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet, when it undertakes generally to carry such freight, it assumes under similar conditions the same obligations so far as the route is concerned over which the freight is to be carried."<sup>26</sup> And, indeed, it may be said that there is great unanimity in the decisions of the states upon this question. The Michigan court, however, has adopted a different rule.

§ 488. — **Michigan rule.**—The Michigan court has steadily held that, as to the carriage of live stock, railroad companies are not common carriers and can only be held to the exercise of ordinary diligence. This doctrine was very ably discussed in the case of *Michigan Southern & N. Ind. R. R. Co. v. McDonough*.<sup>27</sup> The court say: "The transportation of cattle and live stock by common carriers by land was unknown to the common law when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the act of God or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property involving, in their transportation, much fewer risks, and of quite a different kind, from those which are incident to the transportation of live stock by railroads. Animals have wants of their own to be supplied; and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting and frequent concussions of the cars, in their frenzy injure each other by trampling, plunging, goring, or throwing down; and frequently, on long routes, their strength exhausted by hunger and thirst, fatigue

<sup>25</sup> *Lawrence v. Aberdeen*, 5 B. & Ald. 107; *Angell on Carriers*, sec. 214a.

<sup>26</sup> *Myrrick v. Mich. Cent. R. Co.*, 107 U. S. 102, 107. In *Cash v. Wabash R. Co.*, 81 Mo. App. 109, it was said: "The duties and responsibilities of a carrier of live animals are those of a common

carrier with respect to other property, except that they are not insurers against losses or injuries resulting from the inherent nature, propensities and habits of the animals themselves." *McCoy v. K. & D. R. Co.*, 44 Iowa, 424.

<sup>27</sup> 21 Mich. 165.

and fright, the weak easily fall and are trampled upon, and unless helped up must soon die. . . . It is a mode of transportation which, but for its necessity, would be gross cruelty and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in reference to other kinds of property, that I do not think this kind of property falls within the reasons upon which the common-law liability of common carriers was fixed."<sup>28</sup> . . . Upon sound principle and upon the English authorities above cited, I think it clear the transportation of cattle by railroad does not come within the reasons of the law applicable to common carriers, so far as relates to the care of the property and responsibility for its loss or injury."<sup>29</sup>

While the Michigan court is not sustained by the authorities generally, and seems to stand alone upon the general question of liability, a careful analysis of the holdings of the court will show that they are in harmony with most of the courts of the states upon all other questions touching the duties and liabilities of the carrier.

**§ 489. The duty of the common carrier.**—The duty of the common carrier as to the shipment of live stock does not differ very materially in many particulars from the duty of the common carrier as to the shipment of inanimate freight. The carrier must furnish for the shipper suitable stockyards at their station point, and what are suitable stockyards is a question

<sup>28</sup>The Michigan court cites *M'Manus v. Lancashire Ry. Co.*, 2 Hurl. & Norman, 702; *Palmer v. Grand Junction Ry. Co.*, 4 M. & W. 758, quoting from Parke, Baron: "Does the rule as to negligence apply to live animals, as horses? Of course if they were stolen it would, but is it so where they are delivered although hurt or damaged? If misdelivered, the carrier would be liable, but they would not be liable for a mere accident to a live animal supposing the carriage to be safe and good and properly conducted."

<sup>29</sup>*Lake Shore v. Perkins*, 25 Mich. 329; *American Ex. Co. v. Phillips*, 29 Mich. 515; *Mich. Cent. R. Co. v. Hale*, 6 Mich. 243; *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *Smith v. Mich. Cent. R. Co.*, 100 Mich. 148; *Heller v. Chicago, etc. R. Co.*, 109 Mich. 53, where the court held "that a railroad company in carrying live stock is not chargeable with the common-law liability of a common carrier, but is only bound to transport with ordinary prudence, skill and care, and with reasonable dispatch."

for the jury, depending, of course, upon the country surrounding the station, and the extent of the business of shipping stock.<sup>40</sup> They must also furnish suitable facilities for loading stock into cars, and it should be remembered that the same rule attaches in this class of freight as that which obtains where the freight was inanimate, namely, that when the stock is delivered into the custody and control of the carrier by delivering it for immediate shipment at their stockyards, it is from that time in transit. It is the duty of the company to furnish suitable cars for feeding the stock. This is a matter that has often been before the courts.<sup>41</sup> There must be cars suited to the particular season of the year, the climate of the country, as far as may be, and it has been held that they must be free from infectious or contagious diseases that the stock would be liable to contract by shipment in them.<sup>42</sup> And where stock contracted a disease by reason of shipment in the cars of the company, the company was held liable for the damage; in other words, it was held that this was negligence upon the part of the carrier. It is also the duty of the company to properly feed, water and care for the stock where there is no contract exempting them from that liability. This, however, is a matter that is largely governed by special contract.<sup>43</sup> But even where the shipper by contract takes upon himself the duty to

<sup>40</sup> *Covington Stockyards Co. v. Keith*, 139 U. S. 128; *Gulf R. Co. v. Trawick*, 80 Tex. 370; *Tex. & Pac. R. Co. v. Fainbrough*, 55 S. W. 182.

<sup>41</sup> *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 15 L. R. A. 534, held, "the carrier is not an insurer of live stock, but must provide suitable means for its conveyance and use all reasonable diligence and forethought in the varying circumstances arising in the business." *Bells v. Chicago, etc. R. Co.*, 92 Ia. 342; *Great Western, etc. R. Co. v. Hawkins*, 18 Mich. 427; *Pratt v. Ogdensburg R. Co.*, 102 Mass. 557; *Trace v. Pa. R. Co.*, 26 Pa. Super. Ct. 466.

<sup>42</sup> In *Ill. Cent. R. Co. v. Harris*, 184 Ill. 57, 48 L. R. A. 175, it was held, "the communication of Texas fever by infected cars, to cattle

transported in them, renders the railroad company liable for damages." In *Betts v. Chicago, etc. R. Co.*, 92 Ia. 343, 25 L. R. A. 248, it was held, "a carrier is liable for injuries to live stock carried by it if it fails to provide cars reasonably safe to transport it."

<sup>43</sup> In *Missouri Pac. R. Co. v. Fagin*, 72 Tex. 127, 2 L. R. A. 75, it was held, "a carrier has the duty to feed and water stock during transportation, and cannot transfer it to the shipper by a custom requiring him to go along on the same train with the stock to feed and water them at his own risk and expense." *Ill. Cent. R. Co. v. Adams*, 42 Ill. 474; *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 734. See note to *Missouri Pac. R. Co. v. Fagin*, 2 L. R. A. 75.

look after the feeding and watering of the stock, it is incumbent upon the carrier to furnish suitable places and means for feeding and watering. The running of the trains and the transporting of the stock is always under the supervision and control of the carrier. And it is the carrier's duty to stop his trains at suitable places, and facilitate the unloading, yarding and caring for the stock, giving suitable time for feeding and watering, and loading them again into the cars. And where by contract it was expressly agreed that the company was not to be charged with the duty of feeding or watering the animals that were being shipped, but was to afford the shipper proper facilities for doing so, the company was held liable for damage occasioned by reason of carrying the stock forty miles beyond the station where they were to be fed, and keeping them in the cars for two days without food or water or care, beyond where they were to have been delivered.<sup>44</sup>

And where a railroad company accepts horses for shipment over its road under a contract which provides that they are to be loaded, unloaded, fed, watered and cared for while in the cars by the shipper or owner, and at his expense and risk, it was held that the company, as a bailee for hire, having control of the cars in which the horses are placed, is bound at least to furnish the shipper an opportunity to give the animals the care which they require. The court in its opinion say: "The provision in the contract that the stock is to be loaded, unloaded, fed, watered and otherwise cared for while in the cars by the shipper or owner does not mean that the duty is to be performed by the shipper while the train is in motion, and without being afforded an opportunity by the company to perform the duty. If the provision should be given any force, it creates a very fair inference that the company will afford the shipper the opportunity to perform the duty which it has seen fit to provide shall rest upon him."<sup>45</sup>

It is also the duty of the carrier to furnish facilities for unloading the stock at its destination and for keeping them until delivered to the consignee.<sup>46</sup> And so where the carrier allowed

<sup>44</sup> Bryant v. S. W. Ry. Co., 68 Ga. 805.

<sup>45</sup> Smith v. Railway Co., 100 Mich. 148, 156, 45 Am. & Eng. R. Cas. 348.

<sup>46</sup> Chesapeake R. Co. v. American Exchange Bank, 92 Va. 495; Gulf, etc. Co. v. York, 2 Tex. App. Civ. Cases, sec. 812.

its stock pens to become in a condition unfit to hold the stock on account of the fences being rotten and insecure, the carrier was held liable for cattle that escaped from them.<sup>47</sup> All these duties and obligations are laid upon the carrier because of the rule of law that demands that he shall at all times be diligent and do whatever is necessary to be done in order to safely transport the stock which he is employed to carry, and deliver it to the consignee. As, for example, it has been held that it was the duty of the carrier to prevent the injury of animals because of excessive heat when it can be reasonably done.<sup>48</sup>

**§ 490. Statutes of United States with reference to duties of the carrier.**—Statutes have been passed both by the United States congress and the legislatures of the states regulating the duties of common carriers, especially their duties with reference to the carriage of live stock. We have not space here to cite and quote statutes. Notable among the statutes in this respect are those requiring the common carrier to feed and water stock in transit, providing that they shall not be in the cars consecutively for more than twenty-eight hours. Notice the statutes of the different states and of the United States.<sup>49</sup>

**§ 491. The shipper must deal fairly with the carrier.**—It is a duty incumbent upon the shipper to deal fairly with the carrier. If he knows of any peculiarity of the animals that would increase the risk or liability of the carrier, he should disclose it at the time of making the shipment. As, for example, that the animals, or any of them, are wild, ungovernable or vicious, or liable to injure the others; or, if they have been exposed to any disease, especially infectious or contagious disease, which might be communicated or infect the cars or yards of the carrier.

It goes without saying that if the shipper has by reason of failure to disclose any conditions or facts known to him, the withholding of which results in injury or damage to others, and also in subjecting the carrier to the payment of damages, he is liable to the carrier for the damages which are shown to result from such unfair action upon his part. It is but another application

<sup>47</sup> *Cooke v. Kansas City, etc. R. Co.*, 57 Mo. App. 471.

<sup>48</sup> *Ill. Cent. R. Co. v. Adams*, 42 Ill. 474; *Toledo, etc. R. Co. v. Hamilton*, 76 Ill. 393; *Sturgeon v. St. Louis, etc. R. Co.*, 65 Mo. 569;

*Heller v. Chicago & Grand Trunk R. Co.*, 109 Mich. 53.

<sup>49</sup> *Texas, etc. R. Co. v. Byers Bros.* (Tex. Civ. App. 1905), 84 S. W. 1087, 3 U. S. Compiled St. (1901) pp. 2995, 2996.



of the principle that the shipper must be held liable for damages resulting from his own fault; but such conduct of the shipper will not excuse the carrier for negligence in shipping, transporting or delivering the goods.

## SECTION VI.

### WHERE THE LOSS OR INJURY IS OCCASIONED FROM THE EXERCISE OF PUBLIC AUTHORITY.

§ 492. **The reasons for the exception.**—The reason that this exception obtains is apparent. Public law and authority must dominate and govern all persons, companies and business within its jurisdiction. Upon that depends their protection, and at its hands they must accept rules governing their liability. So, where the law or public authority is set in motion it is presumed to do justice, and whomsoever it affects must accept the consequences of its just adjudication. As where goods are delivered to a common carrier for shipment, and are levied or attached in the hands of the carrier upon a valid writ of attachment or execution, by means of which the carrier is deprived of the possession of the property by the officer who serves the writ, the carrier is not liable for the non-delivery of the goods to the consignee, provided the writ upon its face is a valid writ, and from a court having competent jurisdiction to issue it.<sup>50</sup> If the rule were

<sup>50</sup> In *Pingree v. Detroit, L. & N. R. Co.*, 66 Mich. 143, 144, Mr. Justice Campbell, speaking for the majority of the court, said: "There seems to be a little apparent conflict between the cases on this question, but there can be no doubt where the rule of justice lies. If the carrier could rely against all the world upon the right of the consignor to intrust him with possession, then it would be reasonable to hold him estopped from questioning that title. But there is no authority for such immunity. The true owner may take his property from a carrier as well as from any one else. If a carrier gets property

from a person not authorized to direct its shipment, he has been declared by the supreme court of this state to have no lien for his services and no right to retain the property. *Fitch v. Newbury*, 1 Doug. 1. There is no sense or justice in enabling a consignor to compel a carrier, at his peril, to defend a title that he knows nothing about, and has no means of defending unless the consignor gives it to him. In the present case the attachment was against plaintiff's mortgagors and was regular. It must have been levied on the claim that plaintiffs had no right to the goods. Defendant could not have resisted the seizure

otherwise it would be not only exceedingly unjust to the carrier, but would recognize an infringement upon the authority of the law, by inviting its disobedience; would work injustice to the carrier by often holding him liable for property to which the shipper had no title, thus opening the door to fraud.

without incurring the risk of serious civil and perhaps criminal liability; and if plaintiffs' claim is correct, this must have been done at defendant's own risk and expense. This precise question was decided in favor of the carrier in *Stiles v. Davis*, 1 Black. 101, upon the ground that defendant was not required to resist the sheriff, and could not properly do so. This rule has been adhered to by the United States supreme court and followed to a considerable extent. It is the only rule compatible with public order. A carrier must otherwise resist the officer, or find some one who will swear out a replevin, which a carrier usually has not knowledge enough to justify. If the carrier cannot call on the consignor to defend, and must take the risk and the loss, his position would be one of hopeless weakness. If he declines to accept custody of the goods, he runs the risk of an action; and if a wrongful holder by doubtful title, or even by theft compels him to receive the consignment, he can get the value from the carrier who has had them seized by the true owner, unless the carrier has means of proof, that he never can be presumed to have, of the lack of interest in the shipper. Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that the regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable

for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority." Where governmental authorities prevented carrying till duty paid. *Pennsylvania Co. v. Canadian P. Co.*, 107 Ill. App. 386. Not liable when seized by an officer of the law. *Southern Ry. Co. v. Heymann*, 118 Ga. 616, 45 S. E. 491. Where the contract was to ship lead to Japan during Japan and Chinese war, the railway company delivered it to the ship. the customs officers refused to clear the ship, the goods being contraband of war. *Farmers' Loan, etc. Co. v. Northern P. R. Co.*, 112 Fed. Rep. 829. Where goods attached, Ohio, etc. *R. Co. v. Yohe*, 51 Ind. 181. Must see that proceedings are regular, *Bliven v. Hudson Ry. Co.*, 35 Barb. 188. It is enough if the writ is valid on its face. *McAlister v. Railway Co.*, 74 Mo. 361. But see *Kiff v. Old Colony & N. Ry. Co.*, 117 Mass. 591, 19 Am. Rep. 429. Where goods were seized on writ of attachment, and with no knowledge of defendant that they were spirituous liquors, etc., the court ruled below that the goods were not liable to be taken upon a writ of attachment, against the owner; that the facts offered to be proven by the defendant constituted no defense. The supreme court sustained this ruling, citing authorities. *Edwards v. White Line, etc. Co.*, 104 Mass. 159; *Adams v. Scott*, 104 Mass. 164-166.

## CHAPTER VII.

### WHEN THE DAMAGE OR INJURY IS THE RESULT OF DEVIATION OR DELAY.

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| <p>§ 493. Implied undertaking of the carrier.</p> <p>494. — Notice to the carrier.</p> <p>495. — What is unreasonable delay—How avoided.</p> <p>496. — Reasonable diligence.</p> <p>497. Delay occasioned by deviation from route.</p> <p>498. — Loss or injury occurring on deviated route—Act of God or public enemy, etc.</p> | <p>§ 499. — Often duty of the carrier to delay or deviate from course.</p> <p>500. When delay and deviation on account of strikes or riots.</p> <p>501. May discriminate as to shipping perishable goods.</p> <p>502. Duty of carrier as to goods after disaster.</p> |
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§ 493. **Implied undertaking of the carrier.**—The carrier impliedly undertakes on receiving the goods for shipment that he will, without unreasonable delay, transport them by his own route, or the route he is using and has the right to use or control, to their destination, without deviation from the usual line or lines of transportation, and within a reasonable time deliver the goods to the consignee at the point to which they were shipped.<sup>1</sup> In some of the states this prompt shipment and forwarding of the goods is required by statute. A common carrier,

<sup>1</sup> *Hales v. London & N. W. R. Co.*, 4 B. & S. Rep. Q. B. 66, 116 E. C. L. 66. Blackburn, J., said: "The obligation of the carrier to carry depends on his public profession, and therefore he is bound to carry only according to the route which he holds out to the public. But he is bound to deliver in a reasonable time, having regard to that route. It is no breach of his duty that he does not carry by a shorter route than that which he professes. If the customer

wishes his goods sent by a shorter route than the accustomed one he should ask for it, and if refused he could exercise his choice of sending by another carrier; but when the goods are sent by the usual route the carrier must use reasonable diligence, and whether he has done so is a question of fact." *Bibb, etc. Co. v. Atchison, etc. Co.*, 94 Minn. 269, 69 L. R. A. 509, and notes; *Huston, etc. R. Co. v. Foster* (Tex. Civ. App. 1906), 86 S. W. 44.

as we have seen, may be excused from receiving goods for shipment for certain reasons, among which is that he has not sufficient facilities for handling the goods; but he is bound to know when he accepts the goods that he can ship them; that he has or can obtain facilities for shipping them in a reasonable time. He cannot remain silent as to this, receive the goods, hold them in his warehouse to the damage of the shipper or consignee, and answer that for want of facilities he did not ship them. In such case it is the duty of the carrier to give the shipper notice of the situation, that he is unable to ship at once because of lack of means of transportation, thus giving the shipper the option of shipping them by another carrier if he desires, or leave them with the carrier making the excuse. Under certain circumstances the carrier would be excused if his business becomes congested and there is such a press of business that the carrier cannot transport the goods at once. In such case, however, if the carrier has notice of the fact, or of facts from which he might reasonably conclude that that would be the result, his duty is to give the shipper notice of the condition, and that he cannot, or probably cannot, transport the goods at once; in other words, if the carrier has no legal reason for not complying with the request or demand of the shipper for immediate shipment, he is bound to notify him in order that he may have the option above mentioned. So, where a plaintiff delivered to an express company venison for shipment on the promise of the agent to forward it by a certain train, and such train did not stop for express matter, and the agent gave no further notice to the shipper, but forwarded it by a train several hours later, and the venison was spoiled by the delay, the express company was held to be liable for the loss.<sup>2</sup>

§ 494. — Notice to the carrier.—It seems, too, that the law recognizes that where the shipper has given to the carrier notice that he desires the freight to be forwarded at once because he has immediate use for it, or, as is sometimes the case, that it is for the purpose of filling a certain contract, in such case the carrier will be held bound where he receives the goods for shipment to fulfill the contract of affreightment so as to comply with the notice given by the shipper. And where the carrier was informed by the shipper, at the time of delivering certain horses

<sup>2</sup> Cantwell v. Pacific Ex. Co., 58 Ark. 487.

to be shipped to Alaska, that the purpose in shipping the horses was to use them in freighting goods, and that there was a great demand at that point for horses of the kind he was shipping, and that he could make a large amount of money each day by the use of them, and wanted them delivered at a certain time, and they were not delivered until twenty-seven days after the time agreed on, the evidence showing that during the interval between the time when the horses were to arrive and the date of their arrival they could have earned a large amount of money, it was held that in estimating the plaintiff's damage the jury might consider what might have been earned by the horses during the time of delay; the court saying "the general rule is thus stated: No recovery can be had for loss of profits in contracts of sale or contemplated by the shipper unless the facts and circumstances of such sale are communicated to the carrier upon shipment."<sup>3</sup> The reason of the rule is, that the contract of affreightment is presumed to have been made in view of the results which to the knowledge of both parties thereto would naturally follow its breach. While there is respectable authority for holding that profits are never in any case recoverable, since it may never be known what profits might have been earned, the weight of authority, both English and American, sustains the rule that the party injured is entitled to recover all his damages, including gains which he might have earned as well as losses that he sustained, provided they are certain, and are such as might naturally have been expected to follow the breach.

This rule does not run counter to that settled rule of damages, that profits which are remote or uncertain, mere expected profits depending upon numerous contingencies, cannot be recovered because they cannot be said to be the direct and immediate result

<sup>3</sup> *Pac. Express Co. v. Darnell Bros.*, 62 Tex. 639; *Brown v. Hadley*, 43 Kan. 267, 23 Pac. 492; *Brownell v. Chapman*, 84 Iowa, 504; *Manufacturing Co. v. Pinch*, 91 Mich. 156; *Grindley v. Express Co.*, 67 Me. 317; *Ill. Cent. R. Co. v. Cobb et al.*, 64 Ill. 128; *Dunbe & Knapp v. Chicago, etc. R. Co.* (Tex. Civ. App. 1906), 86 S. W. 797; *Northern Pac. Ry. Co. v. American Trading Co.*, 195 U. S.

439, 49 L. Ed. 269; *St. Louis, etc. R. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555. In *Bourland v. Chocland, etc. R. Co.* (Tex. 1906), 90 S. W. 483, 3 L. R. A. (U. S.) 1111, the freight arrived and was demanded, but by mistake of the agent of the carrier was sent away, held carrier liable. See cases collected in notes 3 L. R. A. (N. S.) 1111.

of the non-fulfillment of the contract or agreement; the question under discussion is a very different one, depending upon a very different state of facts; here the parties have in mind the very profits that can be made, as where it is known and understood that the goods are in demand at a certain price if they can be delivered at a certain time, the shipper giving the carrier notice of this and contracting to ship the goods to fill the particular demand, or perhaps to fill a certain order at an advanced price. The shipment is made for this purpose, and the carrier knowing it, and making the contract for the purpose of carrying out the object of the shipment; in such case every sentiment of justice would demand that the carrier should be compelled to fulfill his contract, and certainly, if he knows that he cannot, instead of receiving the goods for shipment he should notify the shipper that he is unable to carry the goods as desired; but if the contract is made in contemplation of such a state of facts, it may be said in case of failure on the part of the carrier that the damages resulting from such failure were contemplated by the parties at the time of making the contract, and the carrier would be liable. If the property shipped is for immediate use, and the object is well understood by the carrier because of receiving notice thereof from the shipper at the time of the shipment, then if the carrier fails and damages result, the carrier would be liable upon the same theory; for the resulting damages must have been contemplated at the time of making the contract of shipment. This has already been illustrated by the case of *Pacific Exp. Co. v. Darnell Bros.*<sup>4</sup> Such damages cannot be said to be speculative or depending upon uncertain contingencies. Nor are they remote from the contract made by the parties, for the situation was fully known and contemplated—indeed, was a part of the contract, and somewhat in the nature of a condition in the minds of the parties making the contract, which should be complied with.<sup>5</sup>

<sup>4</sup> 62 Tex. 639, and cases cited *ante*, § 494.

<sup>5</sup> In *Hadley v. Baxendale*, 9 Exch. 341, Alderson, B., said: "Where two parties have made a contract which one of them has broken, the damage which the other party ought to receive in respect of such breach arising naturally, i. e.,

according to the natural course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." And Cockburn, J., in *Simpson v. Railroad*

In *Manufacturing Co. v. Pinch*\* the Michigan court held that in a suit to recover for machinery and repairs furnished for defendant's flouring mill, he was entitled to show in reduction of plaintiff's claim the value of the use of the mill while it was compelled to lie idle because of the failure of the plaintiff to complete the contract to repair within the time specified.

In *Clarke v. Needles*† it was held, if goods are received by common carriers with orders to ship immediately, and are stored in their warehouse, the navigation being obstructed, and there consumed by fire, they are liable for the value to the owner as common carriers. And where cattle were delivered for shipment to the common carrier, it was held that a conversation had with the agent of the carrier shortly before the execution of the contract was admissible to show notice to the carrier of the plaintiff's intention to sell his cattle on a particular day; and it appearing that the cattle were unloaded through defendant's mistake, and upon being reloaded into the same car a broken wheel was discovered which necessitated additional delay, so that the cattle were delivered to the connecting carrier some seven hours after they should have been delivered, and arrived at their destination some five hours too late for that day's market, it was held that it was a question for the jury whether or not such delay was unreasonable and attributable to defendant's negligence.‡

§ 495. — **What is unreasonable delay—How avoided.**—What is unreasonable delay in the shipping or transportation of the goods is a question of fact for the jury depending upon very many circumstances; the kind of goods that are shipped, the weather, season of the year, the press of business,—no fixed rule can be laid down that will define it or govern in determin-

Co., 1 Q. B. D. 274, said: "The principle is now settled that whenever either the object of the sender is especially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural conse-

quences of proof of that object." *Howard v. Manufacturing Co.*, 139 U. S. 199; *Railroad Co. v. Hale*, 83 Ill. 360; *Allis v. McLean*, 48 Mich. 428; *Harvey v. Railroad Co.*, 124 Mass. 421; *Sedgwick on Dam.* (8th ed.), 174.

\* 96 Mich. 156.

† 25 Pa. St. 338.

‡ *Mo. Pac. R. Co. v. Hall*, 66 Fed. 868.

ing it in all cases; the circumstances of each particular case must determine the question. The court, in the case of *McGraw v. Baltimore & O. R. Co.*,<sup>9</sup> said: "The obligation of the common carrier is to transport the goods safely and within a reasonable time, but what is a reasonable time is not susceptible of being defined by any general rule; the circumstances of each particular case must be adverted to in order to determine what is a reasonable time in that case. But it may be said that the mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are to be considered in determining whether in the particular case there has been an unreasonable delay."

§ 496. **Same subject—Reasonable diligence.**—From what has been said it may be concluded that the general rule is that the carrier is liable for any damage resulting from delay in transporting the goods when the delay is attributable to the negligence of the carrier or his servants; but when it appears that he is not guilty of negligence, but on the contrary has done all that could be reasonably expected of him, and has been diligent in his undertaking to deliver the goods, then in the absence of an express contract for the delivery upon a certain time he will not be held liable; reasonable diligence will excuse the failure upon the implied contract or undertaking. The carrier is bound to deliver the goods at their destination within a reasonable time, except when he is under an express contract to do so at a stated time. The duty to so deliver is an implied duty, but it may be overcome by proofs on the part of the carrier showing that he has used all reasonable care and diligence in transporting the freight, and that the delay was not occasioned on account of his fault or negligence, but because of unforeseen and unavoidable hindrance or misfortune, or unavoidable accident not necessarily the result of the act of God or the public enemy, but such circumstances and conditions, even though they resulted from the act of man, that he could not by ordinary diligence avert. As was said in *McGraw v. Baltimore & O. R. Co.*:<sup>10</sup> "It is obvious that ordinarily

<sup>9</sup> 18 W. Va. 361, 9 Am. & Eng. R. Cases, 188, 41 Am. Rep. 696; *Vicksburg v. Ragadale*, 46 Miss. 458; *Cobb v. Ill. Cent. R. Co.*, 38 Iowa, 601.

<sup>10</sup> 18 W. Va. 361, 367. But where

the freight was accepted by the carrier without notice to the shipper that its delivery would be delayed on account of unusual rush of business, or large accumulation of freight, it was held that these



the delay in shipping articles not liable to decay or damage, such as iron, wool, cotton, grain, and things of like character not liable to be injured by a few days' delay, would be no test in a case where the delay of a day in transportation would result in loss or damage by reason of their nature and inherent character, such as live stock, fish, oysters, fruit, vegetables and things of like character. In the one case there is nothing in the thing itself which would induce a prudent business man to anticipate injury from a temporary delay in transportation, while in the other case any prudent business man, from the nature of the thing itself, might reasonably anticipate the loss or damage from delay. So the season of the year is an element to be considered; some articles, as some kinds of vegetables, being of that nature that at certain seasons of the year a brief delay would be harmless, whereas in another season of the year the delay would result in loss or damage." And so where the delay complained of occurred upon the mountain division of a road, and was occasioned by an unexpected storm of unusual severity upon that division, the operator of the road using every reasonable effort to keep the line open, it was held that the carrier was not liable; that a common carrier is liable for delay in the transportation and delivery of goods only when it is caused by his want of ordinary care and diligence.<sup>11</sup> And where a carrier's canal-boat was run into by a scow which made it necessary for him to stop for repairs, the delay thus occasioned was held excusable.<sup>12</sup> And

conditions were no defense to an action for delay. *Texas, etc. R. Co. v. Kalp* (Tex. Civ. App. 1906), 88 S. W. 417. A carrier to be held liable for special damages for delay, must have had notice at the time the contract was made of the special circumstances. It is not enough that such notice was given during the delay. *Crutcher v. Schoctaw, etc. R. Co.*, 74 Ark. 358, 85 S. W. 770; *Chicago, etc. R. Co. v. C. C. Mill, etc. Co.* (Tex. Civ. App. 1906), 87 S. W. 753.

<sup>11</sup> *Palmer v. Atchison, etc. R. Co.*, 101 Cal. 187.

<sup>12</sup> *Parson v. Hardy*, 14 Wend. 215; *Balentine v. Railroad Co.*, 40

Mo. 491; *Hutch. on Carriers*, sec. 331. In *Gelsmer v. L. S. & N. R. Co.*, 102 N. Y. 563, it was held that "in the absence of a special contract there is no absolute duty resting upon a common carrier to deliver goods intrusted to him within what would be under ordinary circumstances a reasonable time; he may excuse delay by accident or misfortune, not inevitable or produced by the act of God, but the result of the conduct of men; all that can be required of him is that he exercise due care and diligence to guard against delay and to forward the goods to their destination."

the same was held where the delay was on account of deep snow which made the road temporarily impassable; or from the washing away of a bridge by a storm and freshet. It may be said, however, that the rule governing the liability of the carrier for delay is very different from the measure of liability in case of loss or injury to the property. For delay in transporting and delivering the merchandise at its destination the law holds the carrier for liability on account of his negligence, while for loss or injury of the property he is held not on account of negligence or fault, but as an insurer, to be excused only where the loss or injury was the result of the act of God, the public enemy, the act of the shipper, the inherent nature of the goods, the requirements of the law or of public authority.

§ 497. **Delay occasioned by deviation from route.**—Where the delay is occasioned on account of deviation from the usual, ordinary and expected route of the carrier in conveying the goods, it then becomes more serious. As we have seen, there is an implied contract binding upon the carrier to carry the goods over his own line, and if they are to be forwarded over other lines to send them by the usual route to their destination. So, where goods are conveyed by ship or boat the same presumption and implied understanding exists, and the question is, under what circumstances may the carrier deviate from this course. If the deviation from the route is unnecessary, there seems to be no question but that the carrier would be liable; for by deviating from the route he becomes a wrong-doer; but where it is necessary, and the necessity arises during the time the goods are in transit, and the carrier has exhibited a sound discretion in making the deviation, it seems that the carrier would not be liable.

§ 498. — **Loss or injury occurring on deviated route—Act of God, public enemy, etc.**—Upon the consideration of this question, necessarily arises the further question as to the liability of the carrier for loss, even though it is occasioned by the act of God, the public enemy, or those causes which are said to excuse the carrier when they are the direct result of the loss. Here again we are met with the question as to whether the deviation is necessary; whether it occurred during the time the goods are actually in transit, and whether the carrier exercised sound discretion. It seems to be well understood, as we have already stated, that the carrier cannot unnecessarily deviate from his route; that the shipper, when he intrusted his goods to the car-

rier, did it with the understanding that they would be carried over the usual route of the carrier. But there often comes times while the goods are in transit where sound discretion and ordinary diligence dictate that to proceed upon the course would be to encounter great danger, with a probable loss of the property in transit. As, for example, where a ship is proceeding with her cargo and encounters serious danger by floating ice, sound discretion and good judgment would dictate that the course of the vessel should be changed, and that she should undertake to make her port by some other course than that usually pursued, because to pursue the usual course the master would encounter perils and dangers that could not be successfully overcome. It seems to be the rule that when the deviation occurs during the time the goods are in transit, and is necessary, and good judgment and sound discretion are used, in such case the carrier would be heard to make this defense and would be excused if there was loss or injury. But if he deviates from the course unnecessarily, then he cannot be excused from loss, even though while upon the changed course the loss should occur by storm, tempest, lightning, or an act of God, or even by the public enemy, or by reason of the causes which usually excuse the carrier, and which would excuse him in this case had he proceeded without deviation and by his usual route. A case often cited is the case of *Crosby v. Fitch*.<sup>18</sup> This was an action to recover damages for the loss of fifty-two bales of cotton belonging to the plaintiff upon the defendant's boat, shipped at New York to be transported to Norwich. It was claimed by the plaintiff that the usual route from New York to New London and Norwich was through Long Island Sound; that the master sailed from New York with the sloop having the cotton on board and departed from such usual route, going outside of Long Island Sound to the port of New London without any adequate or justifiable necessity; that by means thereof the sloop and the cotton were ex-

<sup>18</sup> 12 Conn. 410, 421. While a carrier is liable for an injury caused by concurrence of its negligence with an act of God, yet such injury must be a natural and probable consequence of the negligence, and not an unusual and unanticipated consequence, such as injury from an unprecedented

flood or storm, to which the delay of the carrier subjected the goods. *Moffatt Com. Co. v. Union Pac. R. Co.*, 113 Mo. App. 544, 88 S. W. 117. If through act of God that could not have been reasonably foreseen, *Empire St. Cattle Co. v. Atchison, etc. R. Co.*, 135 Fed 135.

posed to a severe storm while outside of Long Island and thus the cotton was lost. The defendant claimed that navigation of Long Island Sound was obstructed by ice, and that it was uncertain at what time the sound would become navigable, and in the opinion of the master it would not become navigable for several days; that the closing of the sound by ice for so long a period was unusual, and that to have remained in the port at New York would have exposed their cargo to considerable loss and damage from fire, thieves and other causes. It was conceded upon the trial that the usual track of the vessel from New York to New London and other eastern ports was through Long Island Sound both summer and winter. The court, in its opinion, say: "Was the master in the present instance justified in departing from this route and performing his voyage through the open sea on the south side of Long Island in the month of February? Was there any reasonable necessity for this? We think there was not. The claim is that the navigation of the sound was obstructed by ice and so continued longer than had been usual in former seasons. Still, we see no necessity for the sailing of this vessel while this obstruction continued. The obstruction was of such a nature that the master and all concerned knew that at a day not very remote it must be removed. This was known when the goods were placed on board. There was no contract which rendered it the duty of the master to sail by a given time, or to complete his voyage before a specified day, and if there had been, the freeing of the sound and the unusual continuance of the obstruction was such an act of God as would probably have justified a longer stay in the port of departure. The distinction is a very obvious one between the present case and one in which a vessel already on her voyage and *in transitu* departs from the usual route by reason of obstructions of this nature, or of blockades, etc. In such cases the master must act; a necessity is thrown upon him; and if he is governed by a sound discretion, he stands justified. But here it may as well be claimed that the master would be justified in leaving a safe port during the existence of a violent tempest, or in the face of blockading or embargo restrictions, because it might be uncertain how long these impediments would be in his way. The port of destination in this voyage was Norwich; and it is conceded that the obstruction caused by ice to the navigation of the river Thames usually continues several days longer than the sound

continues frozen. The master knew, therefore, that he could not complete his voyage earlier in consequence of the course he adopted." In that case the carrier was held liable for the property lost. This question often arises in actions against carriers, and is an important principle.

§ 499. — **Often duty of the carrier to delay or deviate from course.**—In the light of what has been said, it is not difficult for us to understand that there may be cases where the courts would be justified in holding that it is absolutely the duty of the common carrier to delay the transportation of the goods, or even to deviate from the usual course, if to leave the port and proceed upon her journey the vessel must necessarily encounter a dangerous tempest and storm which would cause her loss and the destruction and loss of her cargo; although the tempest and storm may be considered to be the act of God, the carrier would not be excused for the loss, as we have already seen. In such case it is his bounden duty to remain in the port until the storm has passed. If it is certain that to proceed with a railroad train it will encounter washouts and freshets and dangers which cannot be overcome, although they may be the direct result of the act of God, still, to unnecessarily encounter them would render the carrier liable, and it would be no defense to say that these calamities were the result of the act of God. In such cases it is the duty of carrier to delay the journey; that is to say, he is not only excused for the delay, but it is his bounden duty to delay. And so, if to proceed with the vessel upon her course she is certain to be captured by the blockade force of an enemy, in such case the master is confronted with a necessity demanding the change or deviation of her course; and, after using sound discretion, good judgment and reasonable diligence, he will not be held for delay. Indeed, it would be said in such case that it was his duty to deviate and change his course; and if he did not, and with knowledge of the fact that to proceed upon her course he would be captured by the public enemy, and he did proceed and was captured, it would be no defense, but he would be liable for the loss.<sup>14</sup> It seems, however, in such cases, that it is the duty of the carrier, if he can do so, to notify the shipper of the condition, but this can hardly be said to be an essential to his defense. In the New York court of appeals, in *Johnson v. N. Y.*

<sup>14</sup> *Crosby v. Fitch*, 12 Conn. 410.

*Cent. R. Co.*,<sup>15</sup> the action was for ninety-one bales of tow addressed to the consignee in New York and delivered to the carrier at Little Falls to be delivered at Albany, thence to be forwarded by the People's Line of steamboats to New York. On its arrival at Albany it was offered by the proprietors to the People's Line who declined to receive it on the ground that they were prohibited by the act of others from transferring freight of that description. The tow was then shipped by the defendant on a freight-barge, which was in good condition, running from Albany to New York. On the passage to New York the tow was lost with the barge. The court say: "There is a class of cases in which an agent is justified by an unexpected emergency in deviating from his instructions where the safety of the property requires it. In this instance no such exigency arose." The court held the defendants liable for the loss of the goods.<sup>16</sup>

§ 500. When delay and deviation on account of strikes or riots.—Where the delay in the transportation of the goods was caused by strikers or rioters, or persons not in the control of the carrier, he is not liable. In the case of *Geismer v. L. S. & M. S. R. Co.*<sup>17</sup> the court say: "A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is, that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination, and so it has been uniformly decided. In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn a bridge, a mob may tear up the track or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed and to forward the goods to their destination." And, as touching the rule of law that the carrier is liable for the acts

<sup>15</sup> *Johnson v. Railway Co.*, 33 N. Y. 610.

*R. Co.*, 45 N. Y. 514; *Davis v. Garrett*, 6 Bing. 716.

<sup>16</sup> *Maghee v. Camden & Amboy*

<sup>17</sup> 102 N. Y. 563

of his servants, which has been urged in cases of this kind, the court further say: "It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service or in any sense its agents, for whose conduct it was responsible. They not only refused to obey its orders or to render it any service, but they willfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employees who were willing to serve it. They became a mob of vicious lawbreakers to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that as to such acts they were the employees of the defendant for whom it was responsible? If they had sued the defendant for wages for the eleven days when they were thus engaged in blocking its business, no one will claim that they could have recovered. It matters not, if it be true, that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that they were not in its service or seeking to promote its interests or to discharge any duty they owed it; but they were engaged in a matter entirely outside of their employment and seeking their own ends and not the interests of the defendant. The mischief did not come from the strike—from the refusal of the employees to work, but from their violent and unlawful conduct after they had abandoned the service of the defendant." <sup>14</sup>

**§ 501. May discriminate as to shipping perishable goods.—** It is a rule of the common law, as well as statutory, in most of the states, that the common carrier must not discriminate in favor of any particular shipper; this we have discussed in another chapter. But these rules have yielded to certain exceptions founded upon the sound judgment of men and a sense of humanity. For example, where perishable goods are received for shipment while there are others awaiting shipment which are not perishable, the carrier not having sufficient facilities for

<sup>14</sup> Pac. & C. R. Co. v. Hazen, 84 Ill. 36; Pac. C. W. L. R. Co. v. L. S. & M. S. R. Co., 6 Am. & Eng. R. Cases, 39; Railway Co. v. Juntzer, 10 Bradw. (Ill.) 205. Bennett v. Hallowell, 65 Ind. 188;

sending all forward may discriminate in favor of perishable goods, as there could be no damage of any consequence by reason of delaying goods that are not perishable, while to delay the perishable freight might result in its entire loss. And where goods are delivered to the carrier for the relief of the sufferers by some great disaster—as, for example, the Chicago fire, the Johnstown flood, and the Texas storm sufferers,—in such case it is the duty of the carrier to forward such goods to the exclusion of goods awaiting shipment in their warehouses if he has not the facilities for both, and he will be excused for the delay of the goods discriminated against. This, of course, is founded upon public policy; it is the saving of the lives of men, and a sense of humanity dictates that in such case relief freight should be forwarded at once.<sup>19</sup>

<sup>19</sup> Mich. Cent. R. Co. v. Burrows, 33 Mich. 6. "Giving preference to relief goods sent to the sufferers of the great Chicago fire was not such a discrimination against shippers of other freight as to make carriers liable as for negligence for not forwarding freight in the order in which it was received. All general rules must yield to a great public necessity." The court say at page 11: "It was urged, however, that it was the duty of the company to send forward freight in the same order in which it was received; that there should have been no discrimination made, no preference given between the classes of freight received by the company for transportation. After the fire large quantities of goods were being sent forward by relief societies from all parts of the country for the purpose of both preventing and relieving the great suffering and distress which did exist and otherwise would have existed among the people, who had by a great public calamity suddenly been left without proper clothing

or houses to shield and protect them from the inclemencies of the season, or sufficient provisions to prevent many of them from imminent danger of starvation. So urgent was the demand for supplies that relief societies sprung up all over the country. The people promptly responded to their calls, and the necessary supplies of all kinds were sent forward in such abundance that railroad companies, crippled as they were by the fire, found it difficult to promptly carry and dispose of their freights. Relief goods, therefore, were given the preference, and the companies would have been justly chargeable with public condemnation had they refused to give a preference to and carry all such goods offered for transportation under the circumstances. Although the company had suffered very great injury by the fire, yet it was doing all in its power to repair the damage as promptly as it could, and at the same time making every effort to carry forward all goods received, making, however, a just, proper and highly com-



§ 502. **Duty of carrier as to goods after disaster.**—From preceding discussions and from what has been said in this chapter upon the subject, the duty of the carrier as to goods that have been injured or delayed during transportation is understood. He must be diligent and careful in looking after them and do all that he can reasonably do to save them for the owner. Even if the injury resulted without fault on his part, as from the act of God, or a cause that would excuse the carrier, he is not excused from further duty in respect to the goods. He must use reasonable diligence in saving all that can be saved, and if he does less he will be held liable for the result of that failure. Some discussion has been had as to what that ordinary diligence requires upon the part of the carrier. If, for example, grain that is being shipped by a steamboat or barge carrying other freight should, during transit, by reason of a severe storm, and without the fault of the carrier, become damaged by water, is it the duty of the carrier to lay up in port, unload and dry the wheat? It has been held that ordinary diligence does not go to that extent, especially when the carrier is loaded with other freight.<sup>20</sup> A different duty would be laid upon him, however, in the exercise of ordinary diligence if he were in port and to stay for some time, for in such case there would be no unnecessary detention of other freight and his duty would be clear. But where a consignment of furs became wet during transit, it was held that it was the duty of the carrier to unpack and dry them,<sup>21</sup> and it may be said generally that whatever ought to be done must be done.

mendable discrimination in favor of that class of goods which would alleviate the suffering and distressed." *Tierney v. N. Y. Cent. R. Co.*, 76 N. Y. 305-315. "It seems where two kinds of property, one perishable and the other not, are delivered to a carrier at the same time by different owners for trans-

portation, and he is unable to carry all, he may, and it is his duty to give preference to that which is perishable."

<sup>20</sup> *Steamboat Lynx v. King*, 18 Mo. 272.

<sup>21</sup> *Chouteaux v. Leech Co.*, 18 Pa. St. 224.

## CHAPTER VIII.

### CONTRACTS REGULATING THE CARRIAGE OF GOODS.

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| <p>§ 503. The object of the chapter.</p> <p>504. Contracts imposing obligations upon the carrier.</p> <p>505. If the contract is to carry by a certain route or in a certain manner.</p> <p>506. — By a certain time.</p> <p>507. — If the contract is to transport by water, it cannot be fulfilled by carrying by rail.</p> <p>508. When the change, deviation or delay from the stipulations in the contract is the fault of the shipper.</p> <p>509. Contracts limiting the liability of the carrier.</p> <p>510. Cannot limit liability when the loss is the result of the negligence of the carrier or his servants.</p> <p>511. Rule in different states as to limitation or negligence.</p> <p>512. — Limiting liability as to amount.</p> <p>513. The consideration of contracts limiting liability.</p> <p>514. — Option to the shipper</p> | <p>to accept contract limiting liability.</p> <p>515. Contract must be reasonable fair and without fraud.</p> <p>516. The contract, how made.</p> <p>517. Contract limiting the time in which to present claim or commence suit.</p> <p>518. Contract limiting liability need not be in writing.</p> <p>519. Construction of the contract limiting liability.</p> <p>520. — Contracts implied from notice.</p> <p>521. — Further consideration.</p> <p>522. — General notice written or printed upon the receipt or bill of lading.</p> <p>523. Representations of the shipper, fraudulent or otherwise.</p> <p>524. When the contract limiting liability inures to the benefit of the connecting carrier.</p> <p>525. Limiting liability in England, especially by notice.</p> <p>526. — The result of this act.</p> |
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§ 503. The object of the chapter.—Thus far, in discussing the liability of the carrier, we have confined ourselves almost entirely to the implied obligations of the parties. It is the object of this chapter to present the liability as created by express or special contract, or by contracts that have the same effect as to rights and liabilities. There are two classes of these contracts that are important: (1) Contracts imposing obligations

upon the carrier not required by implication under the ordinary shipment or bill of lading; and (2) contracts which limit the liability of the carrier.

**§ 504. (1) Contracts imposing obligations upon the carrier.** There can be no question but that the carrier can, by contract, increase his liability, and whether increased or not, when the contract is written, the stipulations must be carried out by the carrier, and for failure on his part to transport and deliver the goods as stipulated in the contract, which results in damage to the owner, the carrier will be liable. And so, if by contract he has agreed to carry the goods to their destination by a particular time, or by a certain route, nothing but a strict compliance with the terms of the contract will shield him from liability if injury or loss occurs. And where the owner of a vessel was under contract to deliver coal received on board at Baltimore to the defendants in New Haven, but on account of the ice the carrier could not get to the dock but arrived in the port of destination, it was held in an action for demurrage for the time the vessel laid in port after her arrival, that the duty of the carrier was, under his contract, to land the cargo upon the dock, and that he would not be excused from this liability because of the ice that prevented him from landing.<sup>1</sup> And it may be said that though prevented from fulfilling the contract by the act of God, or other of the causes that will excuse the carrier in cases where there is no special contract, still he will not be excused if the contract to deliver is special; the contract must govern. In such cases he becomes, indeed, an insurer of the property.<sup>2</sup> And even where the carrier is prevented on account of war, it has been held that this would not dispense with the performance of his contract; he must fulfill the stipulations in the contract as he made them.<sup>3</sup>

**§ 505. If the contract is to carry by a certain route or in a certain manner.**—So, if the contract is to carry the goods by land or water, or by some certain route, they must be so carried, and if the course is changed, no matter for what reason, and there is any damage from delay, or injury to the property, or any loss of property, even if it be by the direct result of an act of God, the carrier is liable. His deviation from the stipulations in the contract renders him an insurer, even against loss that

<sup>1</sup> *Hodgden v. New York & N. H. R. Co.*, 46 Conn. 277.

<sup>2</sup> *Wilson v. Missouri Pac. R. Co.*, 74 Mo. 364, 41 Am. Rep. 318.

<sup>3</sup> *The Harriman*, 9 Wall. 161.

may occur by act of God or the public enemy. And where by contract the carrier agreed to forward certain boxes of goods for plaintiffs from New York to New Orleans by a certain steamer, the *Ocean Bird*, and after receiving the goods and making the agreement it was found the steamer was not running, and the goods for that reason could not be shipped by it, and on learning this defendant forwarded the goods by another steamer, which was lost with the goods, it was held that the carrier was liable for the value of the goods; that the fact that the specified vessel was withdrawn from the route so that the goods could not be shipped by her would not authorize them to forward "by any other special, customary and proper mode of conveyance." It was their duty to notify the owners of the goods and receive instructions; forwarding by another vessel, being unauthorized, rendered them responsible for the consequences.<sup>4</sup> The court say:

<sup>4</sup> *Goodrich v. Thompson*, 44 N. Y. 324, 332. In *Maghee v. Camden & A. R. Co.*, 45 N. Y. 522, the court say: "When a carrier accepts goods to be carried with a direction on the part of the owner to carry them in a particular way, or by a specified route, he is bound to obey such direction; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exceptions in the contract. In *Steel v. Flagg*, 5 Barn. & Ald. 342, a parcel of cashier's notes were delivered to a carrier, to be carried by a mail coach, and were sent by a different coach and were lost; notice had been given to the carrier, of which the owner was cognizant, that he would not be answerable for the value of any article to an amount exceeding five pounds, unless it was insured, and the evidence tended to show that the owner had concealed the nature and value of the package, and it was claimed that the concealment was a fraud upon the

carrier, and avoided his contract. But the court held the carrier liable, and *Bailey, J.*, said: "If this defendant had sent the parcel by mail, in pursuance of his contract, I should have been of opinion that, under the circumstances of the case, he would not have been liable for the loss, but having sent it by a different mode of conveyance, I am of opinion that he is liable." Story on bailments, sec. 509, states the rule, "If the carrier deviates from the voyage, he is responsible for all losses, even from inevitable casualty; for, under such circumstances, the loss is traced back through all the intermediate causes to the first departure from duty." *Fisher v. Boston, etc. R. Co.*, 99 Me. 338, 50 Atl. 532. But when goods are to be transported over several lines and may be forwarded over several different lines, and the bill of lading does not specify any particular line, carrier may designate the route. *Steidl v. Minneapolis, etc. R. Co.*, 94 Minn. 233, 102 N. W. 701.

“Assuming, then, that the receipt was properly given, it was obligatory on the defendants to forward the goods to New Orleans by the steamer designated therein. They were received for that and for no other purpose, and the defendants had no right, on the failure of the Ocean Bird to make the contemplated voyage, to send them ‘by any other usual, customary and proper mode of conveyance,’ as claimed in the second ground of the motion for the dismissal of the complaint. That would justify a control over property which was never authorized. A specific agreement to do an act in a certain manner is not satisfied by an attempt to do it in another, and a failure to accomplish the object. There was no unexpected emergency rendering it necessary to send the goods by the Crescent City. When it was ascertained that the Ocean Bird would not sail for New Orleans, and that therefore the boxes could not be sent by her, it was the duty of the defendants to notify the plaintiffs of that fact and await their instructions. The forwarding of the goods by another steamer than that agreed upon without the assent of the plaintiffs, or any notice to them of their intention so to forward them, was clearly not an execution of the agreement the defendants entered into, and they were chargeable with the consequences of the unauthorized act.”

§ 506. — **By a certain time.**—In a case where the contract was to deliver the goods to a certain place by a stated time, which gave the usual time for the trip, the carrier will be held by the terms of the contract, and such obligation will not be modified by a bill of lading subsequently handed to the shipper's clerk. And when by reason of the failure of the carrier to so deliver the goods the shipper lost a profitable market, the market falling between the time the goods were to be delivered and the time they were actually delivered, the carrier will be held for the damage thus suffered.<sup>5</sup>

<sup>5</sup> Rudell et al. v. Ogdensburg Transit Co., 117 Mich. 568, 76 N. W. 381. In this case the court say: “Delays sometimes occur both on land and water. Many cases like the present and that of the theatrical troupe are constantly arising, where delivery at a certain time is essential. When the shipper and the carrier agree,

through its agent, upon a date of delivery at destination which gives the usual time to make the trip, such contract cannot be held unusual or extraordinary, and is within the general authority of the agent. The carrying business of the country is mostly done by corporations which act through agents, who, as in this case, fre-

§ 507. — If the contract is to transport by water, it cannot be fulfilled by carrying by rail.—When by the agreement of the parties the goods were to be forwarded from New York to Detroit by sail on the lakes, in which the shipper agreed to risk the dangers of the sea,<sup>6</sup> the court say: "The contract in terms is equally restrictive as to the mode of transportation on the lake as it is in the price per hundred. Transportation by sail is one mode and transportation by steam is another mode of transporting goods and property. Both are common modes on our lakes, and are as clearly distinct and as definitely understood, when applied to the commercial business prosecuted on our inland seas, as upon the ocean; and with this clear and well known distinction before us, which has been recognized for many years throughout the world, it will not do to say that an unconditional agreement to transport goods 'by sail on the lake' is not restrictive as to the mode of carrying. . . . When the carrier in error sent forward, from Oswego, the goods by steam, they violated their own express stipulation to transport them from that point by sail, and in doing so they became insurers to the defendants in error for the safe delivery in Detroit of every article of the property. This is a well established legal principle, founded in justice and equity, and numerous authorities might be referred to in support of it; but such reference is deemed entirely unnecessary, as the principle must be well understood, it being an elementary principle of law, that when a carrier undertakes to carry goods in a particular manner, or by a particular route, and without the consent of the owner transports them in a different manner, or by a different route, he becomes the insurer for the actual delivery of the goods at the place of destina-

quently solicit business, and, when the contract is a reasonable one, it must be upheld, in the absence of notice of lack of authority. It is urged that the customary way of carrying on the business of a common carrier is by issuing bills of lading, which constitute the contract between the parties. This custom is not conclusive of the authority of the agent, or of the reasonableness of the contracts he assumes to make. Plaintiffs testified that they knew

nothing of a bill of lading in this case, and had never seen any before the trial. Defendant introduced a bill of lading, which it claims was given to plaintiff's clerk at the time or soon after the delivery of the goods to it. The contract was made before, and defendant could not change it by handing a receipt or bill of lading to a clerk."

<sup>6</sup> *Merrick v. Webster*, 3 Mich. 268, 275.

tion. The plaintiffs below, by the terms of the contract, took upon themselves the dangers of the sea, upon the condition that they were transported 'by sail on the lake,' and upon no other condition did they assume that risk. And if they, after the execution and delivery of the contract, obtain (as asserted on the argument) an insurance upon their goods to be transported 'by sail on the lake,' they could not have recovered upon it. The goods having been lost on the lake without any negligence or fault of the master or hands of the propeller, could have made no difference; they were forwarded by a different mode from that represented by the owners to their insurers. Nor can that make the least difference in the liability of the plaintiffs in error under the contract for the transportation. The rule of law is well settled, that when parties have deliberately put their engagements into writing, without any uncertainty as to the object or extent of the engagement, it is a legal presumption, which has always been held conclusive, that the whole agreement, as well as the extent and manner of its performance, were embodied in the instrument, and by it the parties are bound. All testimony of previous conversations, or declarations at the time or after the execution of the agreement, are rejected upon the ground that such evidence would tend to substitute a new and different contract between the parties, to the injury of one or the other of them. This law is based upon sound reason and cannot be departed from."

**§ 508. When the change, deviation or delay from the stipulations in the contract is the fault of the shipper.**—The shipper as well as the carrier will be held to any stipulations or conditions he is to fulfill or keep in the agreement. Often the shipment depends upon some duty to be performed by him; as, for example, upon the goods being delivered in time for loading, or upon their being properly packed, or in safe condition for shipment, the condition not being apparent. Whenever the shipper's dereliction or misconduct is the direct cause of the failure on the part of the carrier to keep and perform the stipulations he has entered into, then, even though the contract be special or express, the carrier will be excused, for in such case the failure of performance of the contract is not his fault, but the fault of the shipper.<sup>7</sup>

<sup>7</sup> Hutchinson on Car., sec. 319a; Fowler v. Liverpool, etc. Steam Co., 87 N. Y. 190.

§ 509. (2) Contracts limiting the liability of the carrier.—The discussion of this question seems to have resolved itself into two subdivisions: (1) special or express contracts, and (2) contracts implied from notice.

(1) As to the first subdivision there is not much difficulty, the courts holding with great unanimity that the carrier may by express contract limit his extraordinary liability; and this, with the exception of a few of the states that have by statute or constitutional provisions prohibited such limitation, seems to be the general holding in the states and in England. The question was before the supreme court of the United States in *New Jersey Steam Transportation Co. v. Merchants' Bank*,<sup>\*</sup> where it was fully discussed by Mr. Justice Nelson, who delivered the opinion of the court. The court say: "The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident; in other words, the act of God or the public enemy. The liability of the respondents, therefore, would be undoubted were it not for the special agreement under which the goods were shipped. The question is: To what extent has this agreement qualified the common-law liability? . . . As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property, the safe custody and delivery of the goods, we are unable to perceive any well-founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of

\* 6 How. (U. S.) 344. It is generally accepted that a common carrier can by special contract limit his liability. *Russell et al. v. Erie R. Co.*, 70 N. J. L. 808, 1 Am. & Eng. Ann. Cases, 672. In this case the authority of an agent of the shipper to contract to limit the liability of the carrier is discussed and the holding generally accepted would seem to be that whereas a special agent of the shipper may so contract, such an agent would have no authority to change a contract already made

by the owner of the goods. *Hill v. Boston, etc. R. Co.*, 144 Mass. 284; *Zimmer v. New York, etc., R.*, 137 N. Y. 460. *Hays v. Campbell*, 63 Cal. 148, holds carrier is put upon inquiry as to authority of agent when the assumed contract of the agent differs from a prior agreement between the carrier and the principal. *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 483, and see *Nelson v. Hudson River R. Co.* 48 N. Y. 498, for a general discussion of agent's authority.



any other insurer of goods, to which his obligation is analogous, and which depends altogether upon the contract between the parties. The owner, by entering into the contract, virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence. The right thus to restrict the obligation is admitted in a large class of cases founded on bills of lading and charter parties, where the exception to the common-law liability (other than that of inevitable accident) has been, from time to time, enlarged and the risk diminished by the express stipulation of the parties. The right of the carrier thus to limit his liability in the shipment of goods has, we think, never been doubted. But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in the case of *Hollister v. Nowlen*, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification."

A later and a leading case from the supreme court of the United States is *Railroad Co. v. Lockwood*,<sup>9</sup> where the question was discussed by Mr. Justice Bradley, who, rendering the opinion of the court, said: "As the duties and responsibilities of public carriers were prescribed by the public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were

delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, etc., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded." The courts of New York for a long time were not in harmony with this rule as laid down by the supreme court of the United States and the supreme courts of the different states. The New York courts contended that the common-law liability had its origin in public policy, and a limitation of liability therefore affected the public and not alone the parties, and for this reason could not be altered or set aside by an agreement of the parties. But that state soon fell in line with the other states and the United States court, holding to the general doctrine in this country, adopted by nearly all of the courts of the Union where not prohibited by statute or constitution, namely, that the carrier may by special contract limit his liability for any losses; and seems to have gone further and held that the contract may excuse negligence.<sup>10</sup>

<sup>10</sup> *American Trans. Co. v. Moore*, 5 Mich. 368; *McMillan v. Michigan S. & N. I. R. Co.*, 16 Mich. 79; *Kimball v. Railroad Co.*, 26 Vt. 247; *Boorman v. Express Co.*, 21 Wis. 154; *Hoadly v. Northern Trans. Co.*, 115 Mass. 304. It was assumed by both parties as now settled that a common carrier may, by special contract, avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire occurring without his fault. *Grace v. Adams*, 100 Mass. 505; *Illinois Cent. R. Co. v. Morrison*,

19 Ill. 136; *American Exp. Co. v. Schier*, 55 Ill. 140; *Perry v. Thompson*, 98 Mass. 249; *Welch v. Boston R. Co.*, 41 Conn. 333; *Black v. Wabash, etc. R. Co.*, 111 Ill. 351, 53 Am. Rep. 628; *Wabash, etc. Co. v. Peyton*, 106 Ill. 537; *McCoy v. Keokuk R. Co.*, 44 Iowa, 424; *Willis v. Grand Trunk R. Co.*, 62 Me. 488; *Jacobus v. St. Paul R. Co.*, 20 Minn. 125; *Hall v. Cheney*, 36 N. H. 26; *Ashmore v. Pennsylvania Steam Towing Co.*, 28 N. J. L. 180; *Brown v. Adams Exp. Co.*, 15 W. Va. 812; *Kimball v. Rutland, etc. R. Co.*, 26 Vt. 247;

§ 510. Cannot limit liability when the loss is the result of the negligence of the carrier or his servants.—While the carrier may relieve himself of the rigor of the common-law liability holding him as an insurer except in cases where the loss or injury is the direct result of the act of God or the public enemy, he will not be permitted to so limit his common-law liability when the loss or injury was the result of his own negligence or that of his servants. To allow such a limitation would be contrary to public policy, and would permit the carrier to stipulate for exemptions because of the negligence of himself or his servants.<sup>11</sup> And where there was a stipulation in a bill of lading that the carrier should not be liable for loss or damage to the goods by fire, it was held that this would not exempt the carrier from liability where the goods were destroyed by fire through its negligence or the negligence of its employees.<sup>12</sup> And

*Wescott v. Fargo*, 63 Barb. 343, 61 N. Y. 542; *Evansville R. Co. v. Young*, 28 Ind. 516; *Bartlett v. Pacific, etc. Co.*, 94 Ind. 281; *Camp v. Steamboat Co.*, 43 Conn. 333; *Rice v. Railroad Co.*, 63 Mo. 314; *Gaines v. Union Trans. Co.*, 28 Ohio St. 418. Carrier cannot limit liability except by express or implied contract, and in the absence of an express contract no contract to that end will be implied from any condition or regulation in the bill of lading not within the general knowledge of the shipper. This seems to be the general rule. *Baltimore, etc. R. Co. v. Doyle*, 142 Fed. 669; *Central, etc. R. Co. v. Hall*, 124 Ga. 322, 4 L. R. A. (N. S.) 898, and note citing cases. Where the proprietor of a circus company made a contract in writing with the carrier in which the carrier agreed to haul the train loaded by the circus company at a reduced price, the loading being under the control of the circus company, the carrier to be exempt from liability for loss or dam-

age to any of the property while in transit and to be indemnified against damage or injury to any of the circus company's officers, agents, performers or employees, held, to be valid and not against public policy. *Wilson v. Atlantic Coastline R. Co.*, 66 C. C. A. 486, 133 Fed. 1022. Stipulations limiting liability in carrier's receipt must be brought to the attention of shipper. *Hood Co. v. American, etc. Co.*, 191 Mass. 27, 77 N. E. 638. But see cases holding that carrier cannot limit his liability for negligence of himself or servants. *Russell v. Erie R. Co.*, 70 N. J. Law, 808, 50 Atl. 150, 67 L. R. A. 433; *Baltimore, etc. R. Co. v. Fox*, 113 Ill. App. 180; *Georgia Southern, etc. R. Co. v. Johnson, King & Co.*, 121 Ga. 231, 48 S. E. 897; *Paul v. Penn. R. Co.*, 70 N. J. Eq. 442.

<sup>11</sup> *Hatch. on Car.*, sec. 200; *Liverpool, etc. Co. v. Phoenix Ins. Co.*, 129 U. S. 397.

<sup>12</sup> *Liverpool & L. & G. Ins. Co. v. McNeil*, 89 Fed. 131, 32 C. C. A. 173; *Cox v. Railroad Co.*, 170

in *Chicago & N. W. R. Co. v. Chapman*<sup>13</sup> the court say: "The carrier may limit its liability against loss by fire without his fault, and the liability may thus be limited as an insurer and against other losses not attributable to its negligence or that of its servants, and may require the value of goods offered for transportation to be fixed by the shipper to protect itself against fraud in case of loss." The courts of this state have never held that the carrier may limit or restrict its liability for loss or damage resulting from its own gross negligence, or the gross negligence of its servants. On the contrary, it has been repeatedly and uniformly held that it cannot do so, even by express contract with the shipper. The question first arose in *Ill. Cent. R. Co. v. Morrison*,<sup>14</sup> and it was there said: 'We think the rule a good one as established in England and in this country, that railroad companies have a right to restrict their liabilities as common carriers by such contracts as may be agreed upon specially, they still remaining liable for gross negligence or wilful misfeasance, against which good morals and public policy forbid that they should be permitted to stipulate.' And so it would seem to be settled by the great weight of authority that a carrier cannot stipulate for exemption from liabilities which arise from the negligence of himself or his servants, because such a stipulation is forbidden by public policy, and that this is the rule even in case of express contract.<sup>15</sup>

Some of the courts, however, have gone so far as to hold that the common-law liability of a common carrier may be limited even to the extent of excusing the carrier for negligence by express contract.

The supreme court, in *Hart v. Pa. R. Co.*,<sup>16</sup> say: "The limitation as to value has no tendency to exempt from liability for

Mass. 129; Schaller v. Railway Co., 97 Wis. 31; Pierce v. S. Pac. R. Co., 120 Cal. 156, 40 L. R. A. 350, 354. "A carrier is not relieved from responsibility if he has been guilty of negligence." Railway Co. v. Pratt, 22 Wall. 123; Hutch. on Car., sec. 260; Atchison, T. & S. F. R. Co. v. Temple, 47 Kan. 74, 13 L. R. A. 362; Terre Haute & I. R. Co. v.

Sherwood, 132 Ind. 129, 17 L. R. A. 339.

<sup>13</sup> 133 Ill. 96, 8 L. R. A. 508.

<sup>14</sup> 19 Ill. 136; Oppenheimer v. U. S. Exp. Co., 69 Ill. 62; Western, etc. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 2 L. R. A. 287; U. S. Exp. Co. v. Council, 84 Ill. App. 491.

<sup>15</sup> Kansas, etc. Ry. Co. v. Simpson, 30 Kan. 645.

<sup>16</sup> 112 U. S. 340.

negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy."

From this it would seem that the court in this case, in limiting the recovery to the amount of the stipulated value, which was less than the real value of the property, and the loss of the property really occurring from the negligence of the defendants, in a measure upheld the doctrine that the carrier might limit liability as to negligence.

§ 511. **Rule in different states as to limitation for negligence.** It would appear, however, from an examination of the cases in different states, that there is some conflict in the holdings of the courts upon the subject of contracts limiting the liability of the carrier for the negligence of himself or servants. We shall not attempt to give the different rules that have been adopted by the several states of the Union; we can only mention some of the more prominent cases.

In Illinois the rule seems to be that the carrier may contract for exemptions from liability when the loss or injury results from the negligence of the carrier or his servants, but not when the negligence is gross;<sup>17</sup> while in New York the courts have gone so far as to hold that so far as making a contract for limiting liability, it is simply the business of the carrier and the shipper, in which the public have no particular concern, and if the shipper freely and voluntarily makes a contract exempting the carrier from all liability for a valuable consideration, and without fault or deception, the contract being fully understood by the parties, such a contract will be sustained.

Wells, J., in discussing this question in *Parsons v. Monteith*,<sup>18</sup>

<sup>17</sup> *Wabash, etc. R. Co. v. Brown*, 152 Ill. 484.

<sup>18</sup> 13 Barb. (N. Y.) 353. See also comments of Allan, J., in

*Smith v. New York Cent. R. Co.*, 24 N. Y. 222. Notice compilation of cases in 5 Am. & Eng. Ency. of Law (2d ed.), 313; also *Ballou v.*

said: "If I have goods to transport and the common carrier tells me he will carry them for a particular price, without incurring the risk of loss or damage by inevitable accident, but that if he takes such risk he must add a percentage to the price of transportation, I really cannot see what the public have to do with our negotiations, nor why we should not be permitted to make a valid contract with such conditions and stipulations as we choose."

There is also conflict of opinion as to limiting liability to the payment of a less amount than the valuation of the property in case of loss, some of the courts holding that the carrier may limit his liability to a less amount provided the shipper assents to the limitation, and that that assent is presumed on accepting the bill of lading, or receipt which contains the limitation, while other courts have held that, where the loss is from the negligence of the carrier, the shipper may recover the full value of the property destroyed.<sup>10</sup>

§ 512. — **Limiting liability as to amount.**—The liability of the common carrier at the common law as an insurer of the goods of the shipper creates a privilege in the shipper amounting to an interest which, for a consideration, he can no doubt waive, and the law permitting limitation of liability has its foundation rather in the idea of waiver of privilege than in the theory of special contract between the parties. Upon the theory that the limitation is a waiver of a legal right, it would seem to follow that for a valuable consideration the shipper could limit the amount to be recovered for the property in case of loss. We are aware that there are writers who have laid down the doctrine that these contracts of limitation ought not to be sanctioned, for the reason that if the carrier has the privilege to

Earle, 17 R. I. 441, 14 L. R. A. 433, and notes for discussion in holdings of different states.

<sup>10</sup> Conflict of Laws—Carriers of Goods; Contracts Limiting Liability. Cleveland, etc., R. Co. v. Druten, 118 Ky. 237, where the subject is discussed and authorities cited. For a full discussion of the principle and the authorities, see notes to case above cited in 4 Am. & Eng. Ann. Cases 1106.

In Cleveland, etc. R. Co. v. Druten, cited above, the court very fully discusses the question involved, noting and holding as applicable the two commonly accepted principles governing in such cases, viz: that the law of the place of the contract will govern, and that the parties must have so presumed in making the contract, citing *The Kensington*, 183 U. S. 263, 46 L. Ed. 190.

limit the value to be recovered, in case of loss, to a less amount than the property is worth, upon the same course of reasoning the entire liability for damages might be waived; that is to say, if his liability could be limited to a recovery of nine-tenths of the value of the property, it might be limited to four-fifths, if to four-fifths, then to one-half, and if to one-half he might be entirely absolved from all liability. It may be said, however, on the other hand, that the right to recover from the shipper as an insurer of the property, being an interest owned and controlled by the shipper and of value to him, may be disposed of, as any other interest, for a valuable consideration agreed upon between the parties. It is conceded, of course, that for negligence the carrier is liable. That question is involved in the limitation even by express contract. It will also be remembered that the rules of construction that are adopted governing these contracts are favorable to the shipper. In *Judson v. Western R. Co.*<sup>20</sup> the court say: "To this extent, the doctrine that a carrier may limit or modify his liability seems to be most just and reasonable. Inasmuch as the rule of law which holds the carrier to the responsibility of an insurer, except in certain special cases, is founded in a policy which is designed solely for the security and benefit of the owner of goods, there can be no sufficient reason for regarding the rule as absolutely inflexible or irrevocable, when the party in whose favor it will operate, directly or by necessary implication, consents to waive it, or agrees to an essential modification of his own rights under it."<sup>21</sup> And so it may be said that according to the great weight of modern authority in this country, a valid contract limiting the liability of the carrier to a certain agreed amount or valuation of the property carried may be made where it is just and reasonable in its terms, and where the consideration is a reduced rate of freight.<sup>22</sup>

<sup>20</sup> Allen (Mass.), 486, 490.

<sup>21</sup> *Fay v. Steamer New World*, 1 Cal. 348; *Lawrence v. N. Y. B. & P. Co.*, 36 Conn. 63; *Chicago, R. I. & P. R. Co. v. Harman*, 17 Ill. App. 640; *Belger v. Dinsmore*, 51 N. Y. 166. And a stipulation that the value of the goods shall be estimated at the place of shipment held valid in *Phoenix Ins. Co. v.*

*Erie & W. Trans. Co.*, 117 U. S. 314.

<sup>22</sup> *Richmond, etc. R. Co. v. Payne*, 86 Va. 481, 6 L. R. A. 849; *Railway Co. v. Manchester Mills*, 38 Tenn. 653; *Brown v. Cunard S. S. Co.*, 147 Mass. 58; *Squire v. Western Union Tel. Co.*, 98 Mass. 237; *Steers v. Liverpool, etc. Co.*, 57 N. Y. 1; *Missouri, etc., R. Co.*

§ 513. **The consideration of contracts limiting liability.**—The consideration supporting the contract limiting the liability of the common carrier is not at all times clear, and there has been more or less discussion upon the subject and not the utmost harmony among authors and courts. On the one hand it is contended by some writers, and they are supported by the decisions of some of the courts, that "the parties being left free to make their own contract, and having agreed that in consideration of the payment of a certain price by one, certain services, upon stipulated terms as to responsibility, shall be performed by the other, neither can allege that as to him there was no consideration. Such is the general rule as to contracts, and no reason is seen why it should not apply to those between carriers and their employers, so long as they are permitted to make their own terms." This is the language of Hutchinson on Carriers,<sup>23</sup> quoting from the opinion of the court in *York Co. v. Central Railway Co.*:<sup>24</sup> "There is no evidence that a consideration was not given for the stipulation. The company probably had rates of charges proportionate to the risk they assumed from the nature of the goods carried, and the exception of the losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made."

On the other hand, there is a line of cases holding that there must be some consideration moving between the parties supporting the particular stipulation limiting the liability. We think that the settled rule of law, gleaned from all of the authorities, and which the courts in their later decisions seem to bear out, is this: If the contract is not objected to, but accepted by the shipper, the courts will presume that there was a valid consideration for the stipulations limiting the liability; but if the shipper refuses to accept the contract for the reason that there is no consideration, then the consideration is a subject of proof, and this presumption may be overcome the same as every other

v. Patrick (U. S. C. C. A.), 144 Fed. 682. If limitation is sought to be made in receipt of the carrier for the goods, the stipulation must be brought to the attention of the shipper. *Hood Co. v. American, etc. Co.*, 191 Mass. 27, 77

N. E. 638. Burden of proof on the carrier. *Hurst v. St. Louis, etc. R. Co.*, 117 Mo. App. 25, 94 S. W. 794.

<sup>23</sup> Hutchinson on Carriers, sec. 278.

<sup>24</sup> 3 Wall. 107.



mere presumption. And if the proof, when the consideration is attacked, shows that there was no real consideration for the stipulations limiting the liability, then in that case the contract in that respect must fail.

The delivery of freight for carriage and the payment of the rate to the carrier is no doubt sufficient to support the contract for carriage, but the contract under discussion is more than that: it is another and distinct undertaking; it is the giving up or the waiver of a right which the shipper undoubtedly has, namely, that he can insist upon the carrier receiving and transporting his freight over his own line as an insurer without limiting his common-law liability when not regulated by statute. Now, for the waiver of this privilege it would seem there must be a consideration. That consideration may be a reduction of freight rates, or assuming duties of forwarding the goods beyond the carrier's own line, or the offering of any other benefit which he is not legally bound to bestow. But, in our judgment, there must be some distinct, traceable consideration beyond the mere payment of the usual freight rates charged to all shippers.

It has also been held "that if the special contract recites that in consideration of reduced rates the shipper consents to a limitation of the carrier's liability, and it is shown that no reduced rates were in fact allowed the shipper, the limitation is invalid as being without consideration."<sup>25</sup>

<sup>25</sup> 82 Tex. 608; Gulf, etc. R. Co. v. Wright, 1 Tex. Civ. App. 402; San Antonio, etc. R. Co. v. Barnett, 12 Tex. Civ. App. 321; Duvenick v. Mo. Pac. R. Co., 57 Mo. App. 550; Southard v. Minneapolis R. Co., 60 Minn. 382; Mich. Cent. R. Co. v. Hale, 6 Mich. 243. The supreme court of Arkansas, in the case of Little Rock, etc. Co. v. Cravens, 57 Ark. 112, have discussed this question very thoroughly. In that case the plaintiff sued to recover the value of cotton that was burned without fault of the defendants while they held it for shipment. "The defense was that the company was exempt from liability by the terms of the

bill of lading under which they received the cotton. It was alleged and admitted that the carrier company operated a line of road from the point where the cotton was received to the several points of consignment, and that the cotton was received under bills of lading containing provisions to the effect that they should not be liable except for losses occasioned by their negligence. But it was alleged that these provisions were void, for the reason that they were without consideration, unfair, unjust and unreasonable. To maintain this contention the plaintiff proved that the railroad company fixed and published a

In *Wehmann v. Minneapolis R. Co.*<sup>26</sup> the court say: "Such a clause (a clause stipulating to limit liability) to be of force must stand as a contract between the shipper and the carrier, and as in the case of all contracts there must be a consideration

uniform rate for carrying cotton between the points in question, and that his shipments were made according to this rate, that the carrier company furnished to their agents at the point of shipment printed forms for bills of lading that were uniform in their terms, and contained the provisions relied upon in this case, and that the agent had no authority to receive, and would not have received, the cotton except under said bills. It was shown that the plaintiff knew that the bills contained the provisions relied upon, and that he made no objections to the rate fixed, or to the provisions contained in the bills." It was held in this case that the contract relied upon was invalid. In *Deming et al. v. Merchants' Cotton Press, etc. Co.*, 90 Tenn. 306, 13 L. R. A. 518, it was held that "carriers making a through contract for the shipment of merchandise, whether through an initial line agreeing to ship beyond its own road, or through a transportation company having no line of its own, but simply authorized to ship over connecting lines, may insert therein a fire-exemption clause, although no offer is made to assume the risk for additional compensation, since there is no common-law liability to make the through shipment." "A lower rate of freight, or some other equivalent, will be a sufficient consideration for the stipulation." *Dillard v. Louisville & N. R. Co.*,

2 Lea, 293; *York R. Co. v. Ill. Cent. R. Co.*, 3 Wall. 107.

<sup>26</sup> 58 Minn. 22, 59 N. W. 546. The court of West Virginia in *Berry v. W. Va. R. Co.*, 44 W. Va. 538, say: "This court has not denied the validity of the contracts of common carriers limiting their liability, but it has held that they cannot exempt from negligence of the carrier. (Citing cases.) But in these cases it was explicitly stated that there must be a valuable consideration for such special contract, and such I understand to be the general law." Citing *Zouch v. Railroad Co.*, 36 W. Va. 524; *Brown v. Express Co.*, 15 W. Va. 812; *Maslin v. Railroad Co.*, 14 W. Va. 180. In *Baltimore, etc. Co. v. Crawford*, 65 Ill. App. 113, it was held in substance that a provision in a contract of shipment exempting the carrier from liability for injury occasioned by fire is not enforceable unless supported by a reduction of charges, or some other consideration; and the fact that free transportation is given a servant of the shipper is not a sufficient consideration for such exemption where the contract relieves the carrier of its common-law duty to care for the stock while in transit, and imposes it upon the shipper. In *Kellerman v. Kansas, etc. R. Co.*, 68 Mo. App. 255, it was held: "In a shipping contract the consideration clause read: 'In consideration of tariff dollars per car,' etc. held, that this meant the tariff arranged by the railroad commis-

for it. One exercising the employment of a common carrier of goods is bound to receive and carry such (within the class of goods that he carries) as are tendered to him for the purposes, and, in the absence of special contract, to carry them with the

sion according to the law, and was not a reduced rate such as is necessary to furnish the consideration for limiting the carrier's liability." In *Stewart v. Cleveland, etc. R. Co.*, 21 Ind. App. 218, 52 N. E. 39, a contract limiting a carrier's liability to plaintiff expressed a consideration of a reduced rate. The carrier had but one form of contract, but also had bills of lading. In plaintiff's prior shipments he had always paid the reduced rate, although he had not always signed such a contract. The evidence showed that the carrier did not require all shippers to sign such a contract, but did not show what rates such shippers received; and it also showed that the regulation requiring a higher rate in the absence of such contract was "not practiced." Held, that the contract was for a valid consideration. In *Ward v. Missouri Pac. Ry. Co.*, 158 Mo. 226, it was held in substance that a contract of shipment of goods from one state to another stated that the rate charged was special, and given in consideration of a limited valuation placed on the goods, for which the carrier should be liable. The evidence showed that the rate charged for shipment was the regular rate. Held, that the contract of shipment did not limit the consignee's right to recover the full value of goods lost in transit, and the fact that the shipper was required to sign a stipulation that the carrier's liability should not exceed a certain

amount, in order to get the rate charged plaintiff, does not show that the rate charged was not the regular rate. But see *Rubens v. Ludgate Hill Steam Co.*, 20 N. Y. S. 481, where the court held to a different rule, saying, "there still remains a subsidiary question as to the effect of the failure to prove the allegation of the answer, that the consideration for these exemptions and exceptions accorded to the defendant was the low rate of freight the defendant agreed to accept as a condition to its release from any liability for loss resulting from causes exempted. We do not think that such failure on defendant's part was material to the disposition of the case, for the reason that it is entirely competent for the parties to enter into a contract; and where it appears that, in consideration of a stipulated sum, the carrier agrees to perform certain services upon condition of certain exemptions, sufficient consideration is to be found in the carrier's obligation thus assumed to support the exemptions provided for in the contract. Were there a statute requiring the carrier to transport goods at certain specified rates, another question might be presented; but, in the absence of any such statute or law binding upon the carrier to transport at certain fixed rates, we can see no good reason why the shipper and carrier may not enter into a contract upon such terms and conditions as may be agreed upon between them."

full common-law liability of a common carrier. His receipt of and undertaking to carry them, being a duty imposed on him by law, is not a consideration to support such special contract. There must be some other. That is generally furnished by some concession in rates. And where the agreement is set forth in the contract for carriage, it would probably be presumed that, in a case where parties could make any, there was some such concession as a consideration for relieving the carrier of part of his common-law liability."

§ 514. — **Option to the shipper to accept contract limiting liability.**—In the discussion of the questions arising as to the right of the carrier to limit his extraordinary liability, we are confronted with the other rule fixing a duty upon the carrier to receive and transport the freight of all who offer it for transportation, if within the line of their carrier business. So, the question arises, supposing the shipper declines to accept a contract which embraces a limitation of liability upon the carrier? Supposing he demands that he shall have the benefit of that insurance which the common carrier, under his common-law liability, is held to be obliged to give to the shipper? These questions have been raised and met by the courts, and it has been held that the shipper cannot be deprived of this right to insurance which the common law required of the carrier, but that the carrier must give to the shipper an option that he will carry his freight, with the insurance that the common-law liability gives to the shipper, for a certain rate proportionate to the risk that is undertaken by the carrier, or, that he will carry it for a less rate in consideration of a limitation of liability as set forth in the contract. This question was fairly before the court in the case of *Little Rock, etc. R. Co. v. Craven*.<sup>27</sup> The opinion is very full and the principles clearly stated. The courts holding to this doctrine base their opinion upon the principle of law that contracts obtained from the shipper limiting the liability of the carrier must be fair, reasonable and just, and at the same time recognizing the unequal ground upon which the parties stand;

<sup>27</sup> 57 Ark. 112, 18 L. R. A. 527. A carrier receiving blasting powder for transportation can insist upon such terms and limitations of common-law liability as it sees fit, since it is not obliged to re-

ceive and transport such dangerous articles. *California Powder Works v. Atlantic & P. R. Co.*, 113 Cal. 229. 4 Am. & Eng. R. Cases (N. S.) 301, 36 L. R. A. 648

the shipper often being compelled to accept such stipulations in the bill of lading as the carrier sees fit to insert in order to forward his commodity; that he is not really left to his own free will but must take whatever is offered. It is in defense of the shipper's right, and because of that doctrine of public policy which has been so frequently alluded to, that the courts take this position, and it would seem that every principle upon which the law of contract is based would demand that there should be given to the parties an option of free, open and absolute consent—a consent that is given deliberately and from choice rather than that consent which is forced, and given because there is no alternative.

In *Louisville & N. R. Co. v. Gilbert*,<sup>28</sup> where it was shown that a railroad company had made no reduction in its freight rates in consideration of a stipulation in a bill of lading exempting it from loss by fire, and had furnished its agents with no form of bill of lading not containing a fire clause, and had given to their agent no authority to submit to the shipper the alternative of paying a higher rate for a shipment with the common-law responsibility attaching to the company, it was held that the company was liable for goods destroyed by fire, though its officers testify that the company had no higher freight rate where the limited liability clause was omitted from the bill of lading, and that if the shipper had so requested permission would have been given the shipper under a contract without the fire clause in it; the holding of the court being upon the ground that the stipulation was unreasonable and unjust, and was not a valid limitation of the company's liability as a common carrier.

And in *Atchison, Topeka, etc. R. Co. v. Dill*,<sup>29</sup> it was held that a carrier cannot exact, as a condition precedent for carrying stock or goods, that the shipper must sign a contract in writing limiting or changing the common-law liability, and that where a carrier has two rates for carrying stock or goods, one if carried under the common-law liability, and the other if carried under a special contract, the shipper must have real freedom of choice

<sup>28</sup> 88 Tenn. 430.

<sup>29</sup> 48 Kan. 210. "A stipulation in a through bill of lading of non-liability for loss by fire through the whole distance, issued by a carrier having a line extending

only part way to the destination, is valid where it has a rate over its own line for which, if required, it assumes responsibilities for such loss." *Deming v. Merchants' Cotton Press, etc. Co.*, 90 Tenn. 306.

in making his selection or he will not be bound by the special contract.

§ 515. **Contracts must be reasonable, fair and without fraud.** As we have said, the parties to the contract limiting the liability stand upon an uneven footing; the carrier has an advantage over the shipper. It often happens that the shipper is compelled to accept a very different contract from that which he would desire, and hence it is that the law has a jealous care over the rights of the shipper in this particular. The contract must be fair and reasonable, and if it is clear that the carrier has made unreasonable demands and succeeded in obtaining advantage because of the vantage ground he occupies, the courts will not sustain the contract. It is upon this principle that it has been held that the shipper shall have the option to accept a contract of limited liability, or insist upon obtaining from the company the insurance that the common law has required of the carrier. Certainly, if the limitation was obtained by fraud it would be void, as fraud vitiates all contracts. The question of reasonableness and unreasonableness is one of fact for the jury, under proper instructions from the court, and so it may be said that no fixed rule can be laid down with reference to what is reasonable and what is unreasonable, but that each case must stand upon its own facts.

Where the shipper of cattle had an agreement with the carrier as to their shipment, and proceeding upon such agreement loaded the cattle into the carrier's cars, but when they were all loaded and the cars were sealed and the train about to start the agent of the carrier presented another contract in writing to be signed by the shipper, which, while it contained the same rate for shipping that had been agreed upon, contained other stipulations differing from the first agreement, which contract the shipper signed not having an opportunity to look it over, and knowing that unless it was so signed the cattle would not be sent forward, the court held that the contract lacked mutuality, and if unfair could not be enforced. The court say: "Under this state of facts, can it be said that the written contract in question was a mutual agreement, and that the minds of the parties had met upon its essential features? We think there can be but one answer to this question, notwithstanding the theory of some authorities that hold that an execution of a bill of lading by the shipper with restrictive conditions estops him from denying that

he assented to its terms. In cases where the courts have so held, it appeared that the execution was concurrent with the delivery of the goods for shipment. This is a distinguishing feature from the facts of this case, for here it is clearly shown that the goods had been delivered to the carrier and received by it previous to the time the written instrument was signed and delivered. But to the extent that the doctrine of these cases may be opposed to our views, we think they should in reason yield to the principles asserted in that line of authorities that hold that where goods are delivered to a carrier under a verbal contract, not limiting its liability, and afterwards an instrument limiting the carrier's common-law liability is delivered or executed, it must be upon the knowledge and assent of the shipper, or that he knew there were some special terms imposed upon him in the written instrument, and that he was willing and content to accept them without examination."<sup>80</sup>

In *Simons v. Great Western R. Co.*<sup>81</sup> it was proved on the part of the plaintiff "that when asked by a clerk of defendant's at the time the goods were delivered at the company's warehouse

<sup>80</sup> *M., K. & T. Ry. Co. v. Carter*, 9 Tex. App. 685; *Exp. Co. v. Stettaners*, 61 Ill. 186; *Railway Co. v. Reynolds*, 17 Kan. 254; *Railway Co. v. Boyd*, 91 Ill. 271; *Bostwick v. Railway Co.*, 45 N. Y. 715; *Gaines v. Transp. Co.*, 28 Ohio St. 437; *Gott v. Dinshore*, 111 Mass. 52; *Railway Co. v. Jury*, 111 U. S. 591, 592; *Railway Co. v. Mfg. Co.*, 16 Wall. 324; *Navigation Co. v. Bank*, 6 How. 382; *Railway Co. v. Barrett*, 36 Ohio St. 452; *Railway Co. v. Campbell*, 36 Ohio St. 658; *Transp. Co. v. Leysor*, 89 Ill. 45; *Railway Co. v. Cravens*, 20 S. W. 803-807; *Railway Co. v. Lockwood*, 17 Wall. 369; *Express Co. v. Moon*, 39 Miss. 832; *Transp. Co. v. Dater*, 91 Ill. 195; *Levering v. Transp. Co.* 42 Mo. 88; *Express Co. v. Haynes*, 42 Ill. 89; *Express Co. v. Spellman*, 90 Ill. 465; *Adams v. Buckland*, 97 Mass. 124. Also the decisions of the

House of Lords in *Henderson v. Stephenson*, L. R. Sc. & Div. App. 470; *Parker v. Railroad Co.* (High Court of Justice), 25 S. W. 97, 5 Cent. Law Jour. 134, 3 Am. & Eng. Encyc. of Law, 859; 2 id. 822; 2 Rorer on Railways, 1320.

<sup>81</sup> 2 C. B. (N. S.) 619; *Kansas City v. Simpson*, 80 Kan. 645. "Where a horse was shipped by rail and the bill of lading was signed by the carrier and the agent of the shipper, and provided, among other things, value not to exceed one hundred dollars, which was arbitrarily inserted in the bill of lading by the carrier, and through the carrier's negligence the horse was injured, held, in an action by the shipper for damages, that his recovery was not limited by the words 'value not to exceed one hundred dollars'" *Hance v. Wabash, etc. R. Co.*, 56 Mo. App. 476.

to sign the paper, the plaintiff expressed his unwillingness to do so, inasmuch as he could not see to read it, whereupon the clerk said that it was of no consequence, and that the signature was a mere matter of form; and that the plaintiff, relying upon that assurance, signed the paper, it was held that upon this evidence the jury were warranted in finding that the goods were not delivered to the company to be carried under the special contract."

§ 516. *The contract, how made.*—As we have seen, the contract for limiting the liability of the carrier must be a special contract between the shipper and the carrier. Generally, it is written into the bill of lading as a part of it, but it need not necessarily be so written. A parol or verbal contract may exist between the parties and be binding. The contract that is written is not always signed by the shipper. Some of the authorities have required that it should be so signed, but the weight of authority does not demand that it shall be signed by the shipper, and it is generally held that the acceptance by the shipper of a bill of lading, or a written contract limiting the liability of the carrier, is sufficient to complete the contract between the parties, provided there is no fraud or unfair dealing on the part of the carrier.

The completion of the contract by its acceptance by the shipper has come to be favored by the courts, because it is in these days a matter of common knowledge and well understood among shippers that it is the habit of common carriers to limit their liability, and so it is expected by every shipper that certain conditions and stipulations with reference to the liability of the carrier will be written or printed into every bill of lading. So thoroughly has this come to be understood, that the courts have gone so far as to hold that it would not be material to prove, in a case where such a contract was involved, that the shipper did not read the bill of lading before accepting it. And where a shipper of goods filled out a blank receipt contained in a book previously furnished by an express company for his use, and obtained the signature of the company's agent thereto upon the delivery to the company of a package for transportation, the court held that the shipper was presumed to know the contents of the receipt, and if he received such receipt without objection, his consent to its conditions will, in the absence of fraud, be conclusively presumed. The court say: "The plaintiff under-



stood it to be the shipping contract, and in the absence of fraud, by receiving it without objection, he is conclusively presumed to consent to its conditions. It is now generally held that the responsibilities imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation where such stipulation is just and reasonable; and a stipulation that the carrier shall be informed as to the value of goods delivered to him for carriage as affecting the risk and degree of care required is clearly reasonable."<sup>32</sup> But the acceptance of the bill of lading with the contract limiting the liability of the carrier is held not to estop the shipper from denying its validity upon the ground of its unreasonableness, because of the unequal footing of the parties to the contract.<sup>33</sup>

In *Grace v. Adams et al.*<sup>34</sup> it appeared that the plaintiff delivered to the Adams Express Company, as common carriers, at Wilmington, a package containing \$150 directed to one Corbett in Massachusetts; that at the same time the express company delivered to the plaintiff a bill of lading containing the stipulation that the company would not be liable in any manner or to any extent for any loss, damage or detention of such package, or of its contents or any portion thereof, occasioned by danger of railroad transportation, or ocean or river navigation, or by fire, etc. The package was shipped and was accidentally burned with the ship that conveyed it. It also appeared that the plaintiff when he received this bill of lading did not read it. The court say: "The receipt was delivered to the plaintiff as the contract of the defendants; it is in proper form, and the terms and conditions are expressed in the body of it in a way not calculated to escape

<sup>32</sup> *Durgin v. Am. Express Co.*, 66 N. H. 277, 9 L. R. A. 452; *Merrill v. Am. Exp. Co.*, 62 N. H. 514; *Grace v. Adams*, 100 Mass. 505.

<sup>33</sup> *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, held that "A shipper is not estopped to deny the validity of a provision of a bill of lading on the ground of its unreasonableness, since he does not stand on an equal footing with the carrier in accepting the bill of lading."

<sup>34</sup> 100 Mass. 505; *Rice v. Dwight Mfg. Co.* 2 Cush. 80; *Lewis v. Great Western R. Co.*, 5 H. & N. 67; *Squire v. New York Cent. R. Co.*, 98 Mass. 239; *Rubens v. Ludgate Hill S. S. Co.*, 20 N. Y. S. 481; *Toy v. Long Island Co.*, 56 N. Y. S. 182. See *Cent. R. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, where it was held that "mere acceptance of the bill of lading does not establish the shipper's assent to stipulations limiting the carrier's liability."

attention. The acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know, when he took it, that it was a shipping contract or a bill of lading. It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this protection, and are not to be deprived of it by the wilful or negligent omission of the plaintiff to read the paper." The court held that receiving the contract without dissent discharged the carrier from liability for loss by fire not caused by his own negligence.

**§ 517. Contract limiting the time in which to present claim or commence suit.**—The law recognizes that there are reasons for upholding contracts containing a limitation as to the time in which the shipper must present his claim, or bring suit for it, and it seems to be the general consensus of opinion of the courts that the claim should be presented within a reasonable time, and that therefore a limitation clause in the contract which is reasonable as to time will be upheld. It seems that this rule has its foundation in justice and good judgment.

The great bulk of business, as is well understood, is done by railroad and steamship companies handling vast amounts of freight in every country and upon every coast. It is therefore no more than reasonable that these companies which are compelled to act through their numerous agents and servants, who alone know of the circumstances of the loss or injury to the property, and upon whom the company must depend to trace the goods that are lost and to restore them, should be protected in their stipulations limiting the time when claim should be presented. Upon these servants, too, the carrier must necessarily depend for testimony as to the facts sustaining his defense in case suit is commenced. To say that stipulations limiting the time for commencement of suits to a reasonable period are not to be

upheld would often amount to depriving the carrier of the proofs necessary to his defense, and necessary to give to the court and the jury facts that are peculiarly within the knowledge of the agents and servants of the common carrier. Mr. Justice Strong, in *Express Co. v. Caldwell*,<sup>35</sup> said: "A common carrier is always responsible for his negligence no matter what his stipulations may be. But an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of common law ever required. And it is intrinsically just as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid, and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry, hundreds, even thousands, of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss, if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it dif-

<sup>35</sup> 21 Wall. 264, 268; *St. Louis, etc. Co. v. Hurst*, 67 Ark. 407; *Morris v. New H. Steamboat Co.*, 62 N. Y. S. 474; *Norfolk, etc. R. Co. v. Reeves*; 97 Va. 284; *Brown v. Railroad Co.*, 100 Ky.

525; *Cleveland, etc. Co. v. Newlin*, 74 Ill. App. 638; *Cox v. Vermont Cent. R. Co.*, 170 Mass. 129, 49 N. E. 97; *Popham v. Barnard*, 77 Mo. App. 619

ficult, if not impossible, to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers."

**§ 518. Contract limiting liability need not be in writing.**—While the contract limiting the liability must be a special one, it need not be in writing; it may be oral. Whether written or oral it must be clear and explicit, and well understood so that it can be fully proven. If the contract be oral, it may be proven by any competent evidence that will show its existence and terms.

Mr. Justice Campbell, in *American Trans. Co. v. Moore*,<sup>36</sup> said: "While it is true that it devolves upon a carrier to show affirmatively the terms of any contract which lessens his common-law liability, yet that fact is to be proved, like any other, by any pertinent evidence. If in writing, the writing must be shown; but if by parol, there is no rule which requires different proof from that which would establish any other contract. It does not matter that the evidence is conflicting, for in civil cases the jury must always decide upon the weight of evidence; and there is no rule (except where turpitude or illegality is in issue) which requires one contract to be proven by more or different testimony than another. The jury, in each case, must be satisfied that a certain contract exists; and, if satisfied, that is sufficient."

The usual rules of evidence obtain in respect to written and oral contracts, in this case as in others; that is to say, if the contract has been put in writing by the parties, it cannot be contradicted by parol proof of the various oral understandings, for the written contract will be held to have merged in itself all the prior oral agreements touching the same subject; and when such contract does not run counter to the principles we have already discussed that might avoid or modify it, the contract that is written will stand as the agreement of the parties.<sup>37</sup>

**§ 519. Construction of the contract limiting liability.**—As we have seen, the contract limiting the liability of the common carrier is virtually a waiver of rights of the shipper. The shipper, however, may insist upon those rights; he may, as we

<sup>36</sup> 5 Mich. 368, 379.

rison, 19 Ill. 136; *Gould v. Hill*,

<sup>37</sup> Illinois Cent. R. Co. v. Mor-

2 Hill (N. Y.), 623.

have seen, insist upon the shipment of his goods with all the liability of an insurer which attaches to the common carrier by the rules of the common law; for it is conceded that this liability, laid upon the common carrier by the rules of the common law, had its origin in public policy. The contract which limits that liability, therefore, is not only a waiver of the rights of the shipper, but it also affects and changes the rule which originated in public policy. It may be further said that these contracts, although they may be supported by a consideration moving from the carrier, are, nevertheless, largely in the interest of the carrier. Because of this the courts have with great unanimity—indeed, without dissent—held that they must be strictly construed, and, if there be any doubt or ambiguity, the construction should favor the shipper.

In *Fairbanks & Co. v. Cincinnati R. Co.*<sup>38</sup> the court held "that exemptions in favor of a common carrier in bills of lading are to be strictly construed against the carrier, and any doubt or ambiguity therein is to be resolved in favor of the shipper. And when the particular dangers or risks against which the carrier has specifically guarded himself in this receipt are followed by more general and comprehensive words of exemption, the latter are to be construed to embrace only occurrences *ejusdem generis* with those previously enumerated, unless there is a clear intent to the contrary."<sup>39</sup>

§ 520. (2) — Contracts implied from notice.—It seems to be generally conceded by the courts and authorities that the carrier cannot limit his common-law liability by a mere general notice.

Chief Justice Bigelow, in *Judson v. Western R. Co.*,<sup>40</sup> clearly

<sup>38</sup> 47 U. S. App. 744, 33 L. R. A. 271; *Black v. Goodrich Trans. Co.*, 55 Wis. 319, 42 Am. Rep. 713; *Cream City R. Co. v. Chicago, etc. R. Co.*, 63 Wis. 93, 53 Am. Rep. 267; *Little Rock, etc. R. Co. v. Talbot*, 39 Ark. 529.

<sup>39</sup> *Hutchinson on Carriers* (2d ed.), 275, 276; *Hawkins v. Great Western R. Co.*, 17 Mich. 57, 97 Am. Rep. 179; *The Caledonia*, 157 U. S. 124. In *Kennedy v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 423, it was held: "General words in

the contract of a common carrier limiting his responsibility will not be construed as exempting it from liability for negligence, when they are capable of other construction; the rule applies both to carriers of persons and goods." "The contract limiting liability must be fairly obtained, must be just and reasonable." *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430.

<sup>40</sup> 6 Allen, 436, 490, 83 Am. Dec. 646; *McMillan v. Michigan*, etc.

states the prevailing doctrine in this country. He says: "But it is a very different proposition to assert that a common carrier may escape his legal liability or materially change it by general notice to all persons that he will not be responsible for the loss or injury of property intrusted to his custody, or only liable therefore under such conditions and limitations as he may think proper to impose. A common carrier is in a certain sense a public servant, exercising an employment not merely for his own emolument and advantage, but for the convenience and accommodation of the community in which he pursues his calling. The law imposes upon him certain duties and responsibilities different from, and greater than, those which attach to an occupation of a purely private nature, in regard to the conduct of which the public have no interest, and which can be carried on at the option or according to the pleasure of the person who is engaged in it. A common carrier cannot legally refuse to transport property of a kind which comes within the class which he usually carries in the course of his employment, if it is tendered to him at a suitable time and place, with an offer of a reasonable compensation. Like an innkeeper, he is obliged to exercise his calling upon due request under proper circumstances, and is liable to an action for damages if he wrongfully refuses to do so. A legal obligation rests upon him to assume the duty which he holds himself out as ready to perform, and a correlative right belongs to the owner of goods to ask for and require their reception and transportation upon the terms of liability fixed and defined by the established rules of law. The carrier has not the option to accept or refuse the carriage of the goods at his pleasure; but the person seeking to have them transported can choose whether they shall be carried without any restriction of the carrier's duty as prescribed by law, or whether he will waive a portion of his rights, and consent to a modification of the legal liability which attaches to the carrier. Such being the legal relation which subsists between a common carrier and his employer, it certainly would be inconsistent with it to hold that a carrier, by a mere notice brought home to the owner of goods intrusted to his care that he did not intend to

R. Co., 6 Mich. 79, 111; Gott v. Cent. R. Co. v. Frankensberg, 54  
Dinsmore, 111 Mass. 45; Fille- Ill. 88; Davidson v. Graham, 2  
brown v. Grand Trunk R. Co., Ohio St. 131; Brown v. Adams  
55 Me. 462, 92 Am. Rep. 606; Ill. Exp. Co., 15 W. Va. 812.

assume all the liabilities of his calling, could escape or materially change the responsibility which the law annexes to the contract of the parties. It would, in effect, put it in the power of the carrier to abrogate the rules of law by which the exercise of his employment is regulated and governed. Certainly such a notice, even if shown to have been within the knowledge of the owner of goods, would, in the absence of evidence of his direct assent to its terms, afford no sufficient ground for the inference that he had voluntarily agreed without any consideration to relinquish and give up the valuable right of having his goods carried at the risk of the carrier."

The leading case in this country is *Hollister v. Nowlen*,<sup>41</sup> where the question was fairly before the court. The court say: "The principal question in the cause arises out of the notice given by the coach proprietors that baggage carried by the telegraph line would be at the risk of the owner; and the first inquiry is, whether there was sufficient evidence to charge the plaintiff with a knowledge of the notice. If we are to follow the current of modern English decisions on this subject, it cannot be denied that there was evidence to be left to a jury, and upon which they might find that the plaintiff had seen the notice. But I think the carrier, if he can by any means restrict his liability, can only do so by proving actual notice to the owner of the property. I agree to the rule laid down by Best, C. J.,<sup>42</sup> when the courts of Westminster Hall had commenced retracing their steps in relation to the liability of carriers, and were endeavoring to get back onto the firm foundation of the common law. He said: 'If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in his hands a printed paper, specifying the precise extent of their engagement. If they omit to do this, they attract customers under the confidence inspired by the extensive liability which the common law imposes upon carriers, and then endeavor to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them.'

"I should be content to place my opinion upon the single ground that, if a notice can be of any avail, it must be directly brought home to the owner of the property; and that there was

<sup>41</sup> 19 Wend. 234.

<sup>42</sup> *Broke v. Pickwick*, 4 Bing. 218.

no evidence in this case which could properly be submitted to a jury to draw the inference that the plaintiff knew on what terms the coach proprietor intended to transact his business. . . .

“The rules of the common law in relation to common carriers are simple, well defined and, what is no less important, well understood. The carrier is liable for all losses except those occasioned by the act of God or the public enemies. He is regarded as an insurer of the property committed to his charge, and neither destruction by fire, nor robbery by armed men, will discharge him from liability. . . .

“A common carrier exercises a public employment, and consequently has public duties to perform. He cannot, like the tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. If he refuse to receive a passenger or carry goods according to the course of his particular employment, without a sufficient excuse, he will be liable to an action; and he can only demand a reasonable compensation for his services and the hazard which he incurs. . . .

“The law in relation to carriers has in some instances operated with severity, and they have been charged with losses against which no degree of diligence could guard. But cases of this description are comparatively of rare occurrence; and the reason why they are included in the rule of the common law is not because it is fit in itself that any man should answer without a fault, but because there are no means of effectually guarding the public against imposition and fraud without making the rule so broad that it will sometimes operate harshly. It is well remarked by Best, C. J., that ‘when goods are delivered to the carrier they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to their place of destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier’s servant, and they, knowing that they could not be contradicted, would excuse their masters and themselves. . . .

“There is less of hardship in the case of the carrier than has sometimes been supposed: for while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule



is founded upon a great principle of public policy; it has been approved by many generations of wise men; and if the courts were now at liberty to make instead of declaring the law, it may well be questioned whether they could devise a system which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact that in Great Britain, after the courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered and, in all its most important features, restored the salutary rule of the common law. . . .

“So far as the cases have proceeded on the ground of fraud, and can properly be referred to that head, they rest on a solid foundation; for the common law abhors fraud, and will not fail to overthrow it in all the forms, whether new or old, in which it may be manifested. As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust; and if the owner give an answer which is false in a material point, the carrier will be absolved from the consequences of any loss not occasioned by negligence or misconduct. . . .

“But conceding that there may be a special contract for a restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. . . .

“If after a trial of thirty years the people of Great Britain, whose interests and pursuits are not very dissimilar to our own, have condemned the whole doctrine of limiting the carrier's liability by notice; if after a long course of legal controversy

they have retraced their steps, and returned to the simplicity and certainty of the common-law rule, we surely ought to profit by their experience, and should hesitate long before we sanction a practice which not only leads to doubt and uncertainty concerning the rights and duties of the parties, but which encourages negligence, and opens a wide door to fraud."

It may be said, however, that there are certain reasonable regulations made by the carrier by general notice which are considered binding upon the shipper; namely, regulations as to the manner of delivering to the carrier the freight for transportation, the giving to the carrier notice of the character of the freight when not apparent, or the value of the property that is being shipped.

Judge Cooley, in *McMillan et al. v. M. S. & N. I. R. Co.*,<sup>43</sup> quotes with approval the language of Greenleaf: "'It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such and paid for accordingly.'"<sup>44</sup> These are but the reasonable regulations which every man should be allowed to establish for his business, to insure regularity and promptness, and to properly inform him of the responsibility he assumes. And it has been held that notice derived from the usage of the carrier may determine the manner in which he is authorized to make delivery.<sup>45</sup> But beyond the establishment of such rules the force of a mere notice cannot extend. Subject to reasonable regulations, every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common-law liability. 'A common carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a reduced liability; and

<sup>43</sup> 16 Mich. 79, 110, 93 Am. Dec. 208.

<sup>44</sup> Greenl. Ev., sec. 235; *Western Trans. Co. v. Newhall*, 24 Ill. 466.

<sup>45</sup> *Farmers' & Mechanics' Bank v. Champlain Trans. Co.*, 16 Vt. 52; s. c., 18 Vt. 131, and 23 Vt. 186.

the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment.' <sup>46</sup> The fact that a restrictive notice is shown to have been actually received or seen by the owner of the goods will not raise a presumption that he assents to his terms, since it is as reasonable to infer that he intends to insist on his rights as that he assents to their qualification; and the burden of proof is upon the carrier to establish the contract qualifying his liability, if he claims that one exists." <sup>47</sup>

It may be said, however, that the authorities are not entirely harmonious upon this question. While they generally hold that a general or published notice is not sufficient from which a contract limiting liability can be implied, there are cases that go so far as to hold that when the notice is brought home to the shipper, and the course of business is well understood, and has been often acted upon without question by the shipper, in such case it may be binding upon the shipper.<sup>48</sup>

§ 521. — **Further consideration.**—By way of summing up the question of limitation of liability by general notice and drawing conclusions from what has already been said, it may be ob-

<sup>46</sup> *Cole v. Goodwin*, 19 Wend. 251; *Jones v. Vorheis*, 10 Ohio, 145; *Bennett v. Dutton*, 10 N. H. 487; *N. J. Nav. Co. v. Merchants' Bank*, 6 How. 344; *Moses v. Boston & M. R. Co.*, 24 N. H. 71; *Kimball v. Rutland, etc. Co.*, 26 Vt. 256; *Slocum v. Fairchild*, 7 Hill, 292; *Dorr v. N. J. Steam Navigation Co.*, 4 Sandf. (N. Y.) 136, 11 N. Y. 485; *Mich. Cent. R. Co. v. Hale*, 6 Mich. 243. Above cited in the opinion of Cooley, J.

<sup>47</sup> *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

<sup>48</sup> *Bingham v. Rogers*, 6 W. & S. (Pa.) 495. This doctrine was questioned in *Laing v. Colder*, 8 Pa. St. 479, where the judge in delivering the opinion says: "Were the question an open one in Pennsylvania, I should for one unhesitatingly follow them (meaning contrary authorities)

in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom in a vast majority of instances he cannot but choose to employ." See also *Pa. Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 208; *Farham v. Camden, etc. R. Co.*, 55 Pa. St. 53. It has been held in Kentucky "that public notice given by the carrier and brought home to the knowledge of the shipper, enters into the contract of affreightment so far as the carrier has right to impose terms, etc." *Orndorff v. Adams Express Co.*, 3 Bush (Ky.), 195. In North Carolina it has been held that notice brought to the knowledge of the owner will reasonably qualify the liability of the carrier in certain cases, as, that they will not be liable for glass in a box or articles of unusual

served: First, the contract for carriage as to the liability of the carrier is fixed by the common law except as modified by statute or contract. Second, the shipper may insist that there shall be no modifications, when there are no statutes providing for it, and that the carrier shall transport his freight as an insurer. Third, no modification can be made by the mere act of the carrier alone. Fourth, the contract modifying the liability, to be valid, must have a consideration to support it.

With these settled principles of the law as to modifying the common-law liability of the carrier, what conclusion can be drawn as to the effect of a general notice? If the notice is posted up in conspicuous places or published and circulated through newspapers or other public means and made as public as possible, it could not possibly partake of the requisites suggested. If this sort of notice limits the liability, the shipper would be deprived of his right to ship his goods so as to take advantage of the common-law liability of the carrier. It would deprive him of that right we have seen belongs to him, to insist that there should be no modification of liability. The carrier could make his own terms, and, without consulting the shipper, could determine his own liability to suit himself; there need be no consideration and no assent. To hold that such a notice could modify liability would be to sweep away every principle that has been grounded by the prevailing authorities and decisions in this country.

§ 522. — **General notice written or printed upon the receipt or bill of lading.**—The authorities do not seem to agree as to the extent of limiting the liability of the carrier by a printed or written notice upon the receipt or way-bill given the shipper at the time delivering the goods. There is a distinction made by the courts as to stipulations written in the bill of lading limiting the liability and signed by the carrier or his agent, and a general notice written or printed upon the receipt or upon the bill of lading and not signed by any person. There are certain

value unless informed of the facts. *Smith v. N. Car. R. Co.*, 64 N. C. 235. And in Maine, that notice brought home to the owner of goods at the time of the delivery for shipment, if expressly or impliedly assented to, will re-

strict liability. *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462; *Little v. Boston, etc. Co.*, 66 Me. 239. See the strong language of Cowen, J., in *Cole v. Goodwin*, 19 Wend. 260.

facts which should be taken into consideration with reference to the bill of lading. First, it is generally understood that the carrier, by the bill of lading, seeks to limit his liability; and further, it is understood that there is a place on or part of the bill of lading where the language limiting the liability is generally written or printed, so that it may be said that the shipper would look to this part of the bill of lading for the stipulations limiting the liability, and when they are written here and signed by the carrier, or the agent of the carrier, and delivered to the shipper at the time the goods are delivered for transportation, and the shipper receives the bill, he is presumed to have accepted these stipulations and to understand the contents of the bill. But it is very different when the instrument delivered is a receipt with a general notice written or printed upon it, not signed, or when it is a general notice printed upon the contract or the bill of lading and not in a conspicuous place, and not accepted or assented to by the shipper. But as to these notices it may be said that if they are notices printed upon the receipt or the way-bill in such a way and so conspicuous as to bring the contents home to the shipper, and the notice is as to the receiving of the goods for shipment, and is reasonable as to the value of the goods, and the amount for which the company will be held liable, such cases, it seems, will be held to be valid. It is upon the theory that the carrier has the right to know the character of the freight that is being presented for shipment. Is it gunpowder or dynamite or dangerous explosives that are sought to be shipped? If so, the carrier may fix his terms for receiving it, and may refuse to accept it under the common-law liability. Are the packages what they appear to be, or is there a reasonable suspicion that they contain goods secreted within them of very much greater value? Are they goods as they appear, of little value, or do they contain hidden from view among other goods, bank bills, gold coin, diamonds, or such like articles as would very greatly increase the rate of shipment and the responsibility of the carrier? In such cases there can be no doubt but that the carrier has the right to know the responsibility he is assuming; and along this line, and by way of fixing his responsibility in such cases, he may give notice to the shipper of certain requirements which must be complied with, which will be binding and the law will enforce. But if the notice refers to the liability of the carrier in transporting the goods, where there

is no fraud or deception in the delivering or the receiving of them by the carrier, such liability cannot be limited by notice upon the receipt or bill of lading unless assented to by the shipper.

It was said by the supreme court of New Hampshire in *Moses v. Boston, etc., R. Co.*:<sup>49</sup> "We do not mean to hold that there are no cases in which the carrier may, by notice, define and qualify his responsibility. It may be quite reasonable that he should insist on proper information as to the value of the article which he carries. This would not seem to be any infringement upon the principle of the ancient rule. He must have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. We can see nothing that ought to prevent him from requiring notice of the value of the commodity delivered to him, when, from its nature, or the shape and condition in which he receives it, he may need the information; nor why he should not insist on being paid in proportion to the value of the goods, and the consequent amount of his risk." And in *Railroad Co. v. Mfg. Co.*<sup>50</sup> the supreme court of the United States, in an opinion by Mr. Justice Davis, discuss this question, after quoting with approval from *N. J. Steam Navigation Co. v. Merchants' Bank*,<sup>51</sup> and says: "These considerations against the relaxation of the common-law responsibility by public advertisements apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain by indirection exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing,

<sup>49</sup> 24 N. H. 71, 9 L. R. A. 455.

<sup>51</sup> 6 How. 344.

<sup>50</sup> 16 Wall. (U. S.) 318.

that he intends to rely upon the law for the security of his rights. It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed such an action is seldom resorted to on account of the inability of the shipper to delay sending his goods forward. The law in conceding to carriers the ability to obtain any reasonable qualifications of their responsibility by express contract has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community. The weight of authority is against the validity of the kind of notices we have been considering. And many of the courts that have upheld them have done so with reluctance, but felt themselves bound by previous decisions.”<sup>52</sup>

<sup>52</sup> *York Co. v. Cent. R. Co.*, 3 Wall. 107, 113. “He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of a responsibility by making exorbitant charges when such assent is refused.” The supreme court of Illinois, in *Merchants’ Dispatch, etc. Co. v. Furthmann*, 149 Ill. 66, where there was written upon the back of the receipt for the goods delivered the following notice: “The within mentioned goods to be forwarded under the following conditions,” after noting a number of conditions, say: “If the contention of appellant is correct, the paper of May 4 is a receipt for the goods, with a contract to carry, upon certain conditions printed on the back of it, signed by no one. We are clearly of the opinion that such a re-

ceipt should not be given the legal effect of a special contract limiting a public carrier’s common-law liability. No good reason can be shown why, if the intention is to so contract with the shipper in good faith, the conditions should not be embodied in the contract and properly signed, as was done in the bill of lading dated May 6, and this we understand to be in harmony with the decisions in *New York*. There the court of appeals has, as before stated, held that where the conditions are embodied in the receipt or bill of lading, as in *Belger v. Dinsmore*, 51 N. Y. 166, the acceptance of the paper is conclusive evidence of the fact that the shipper knew its contents and assented thereto; but we have been able to find no decision of that court giving such a construction to a mere receipt

§ 523. **Representations of the shipper, fraudulent or otherwise.**—The shipper is under as binding an obligation as the carrier to deal fairly and honestly in making the shipment. If his attention is called to the matter of value or contents of the package he must state truthfully to the shipper with reference

calling attention to conditions on the back of it. On the contrary, it has there been uniformly held that the liability cannot be restricted or limited by notice, whether brought home to the shipper or not." In *Indianapolis, etc. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640: He may limit his responsibility by notice if brought home to the consignor and assented to clearly and unequivocally by him. *Buckland v. Adams Exp. Co.*, 97 Mass. 124, 93 Am. Dec. 68. But this assent is not to "be inferred from the mere fact that knowledge of such notice on the part of the owner or consignor of goods is shown. The evidence must go further and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties." The burden is on the carrier to show a restricted liability, and that a notice to that effect was received or seen by the shipper is not sufficient; his assent must be shown. *McMillan v. Mich. etc. R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; 30 Am. & Eng. R. Cases, 12, note; 37 Am. & Eng. R. Cases, 477, note. See also article by C. C. Binney, 27 Am. Law Reg. (N. S.) 628, note; Hutch. on Car., sec. 256. "However this may be, when the knowledge of such a regulation of the carrier in the conduct of his business has come to the shipper only by notice directly conveyed to him or by a previous course of dealing, there

is no question that 'when the carrier, in the very contract by which he undertakes to carry the goods, whether it be in the form of a receipt accepted by the shipper, or any other form of express contract, has declared that if not apprised of the value of the thing to be carried, and paid for his risk accordingly, he will be liable only to a certain extent, the shipper, if he would hold him in case of loss beyond that limit, must inform the carrier, whether the inquiry be made of him or not, of the value of which he wishes him to assume the risk, and must compensate him accordingly. And some of the cases have gone so far as to assert that where the liability of the carrier is thus conditionally limited, if the owner of the goods of greater value than would be ordinarily indicated by the box or package in which they are contained, delivers them to the carrier without any notice of their extraordinary value and without paying charges on them commensurate therewith, any attempt, in case of their loss, to impose a liability upon him beyond the limit prescribed in the contract would be an attempted fraud upon him, and that even if the loss were shown to have been the result of negligence, unless it were of so gross a character as to be tantamount to a misfeasance, the carrier would be protected by the terms of his receipt."



to these matters, and if he does not, or if he consents to the shipping of the freight upon a statement of a limited value for the purpose of receiving a lesser rate, in case of loss or injury to the freight he will be estopped from claiming that the goods are of greater value than the amount stated at the time of their shipment. So it follows that if the statement as to value, or the statement as to contents of packages, be fraudulently made by deceit and misrepresentation for the purpose of obtaining a less rate for their transportation, he will at least be held to have assented to the amount stated at the time of the shipment; and if by reason of his deceit, misrepresentation and falsehood, goods are taken that are dangerous and that require particular care in transporting them, and because of the deception of the shipper injury results to the carrier by reason of explosion or other damage, in such case the shipper would be liable to the carrier."

§ 524. When the contract limiting liability inures to the benefit of the connecting carrier.—Whether the contract limiting the common-law liability inures to the benefit of a connecting carrier depends, it seems, upon the terms and extent of the contract for shipment. If the contract is for through transportation, it is generally conceded that it will inure to the benefit of all the connecting carriers, but if it is simply to carry goods over the line of road of the first carrier and there deliver them to the connecting carrier, the stipulations limiting the liability can only benefit the first carrier—the party with whom the contract was made. And where the contract for shipment was to transport and deliver goods at a point beyond the terminus of its own line, and contained the following clause: "Unavoidable accidents of the railroad and of fire in the depot excepted," it was held "that, in the absence of proof of any other or new contract, this

<sup>22</sup> *Railroad Co. v. Fraloff*, 100 U. S. 24. "As a condition precedent to its transportation, they may require information from him as to its value, and demand extra compensation for any excess beyond that which he may reasonably demand to be transported as baggage under the contract to carry the person. They may be discharged from liability for its full value if he

by any device or artifice evades inquiry as to such value whereby a responsibility is imposed upon them beyond what they are bound to assume in consideration of the ordinary fare charged for the transportation of the person." *Steers v. Liverpool, etc. S. S. Co.*, 57 N. Y. 1; *Hill v. Railroad Co.*, 144 Mass. 284; *Rosenfield v. Railroad Co.*, 103 Ind. 121.

exception would be held to extend to every other connecting carrier who shared the freight specified in the bill of lading, and that in an action against such connecting carrier, the goods having been lost while in its possession, he could claim the benefit of it.”<sup>54</sup> But where the contract was with the common carrier for an agreed compensation to carry the goods to the terminus of his road, and then deliver them to another carrier, it was held that “no authority results from the relation or from the contract empowering him to enter into a special contract on behalf of the owner with the next carrier limiting or restricting the liability of the latter. The whole duty of the first carrier terminates with the delivery of the goods to the second, and the common-law liability of the latter attaches at once by necessary implication upon the receipt thereof.”<sup>55</sup> The court in the opinion using this language: “Carriers who are not named in a contract for the carriage of goods and who are not formal parties to it may, under certain circumstances, have the benefit of it. Such is the case when a contract is made by one of several carriers upon connecting lines or routes for the carriage of property over the several routes for an agreed price by authority, express or implied, of all the carriers. So, too, in the absence of any authority in advance, or any usage from which an authority might be inferred, a contract by one carrier for the transportation of goods over his own and connecting lines, adopted and acted upon by the other carriers, would inure to the benefit of all thus ratifying it, and performing service under it. But in such and the like cases the contract has respect to and provides for the services of the carriers upon the connecting routes.”

**§ 525. Limiting liability in England—Especially by notice.—**

From a very early period the English courts recognized that carriers might limit their liability by contract or by notice, and by notice which was very general in its character. Indeed, it may be said the English courts, from the decision of the case of *Gibbons v. Paynton*<sup>56</sup> in 1769 down to the time when the carrier's statute passed the parliament in 1830, allowed the carrier great latitude by way of shielding himself from liability

<sup>54</sup> *Maghee v. Camden, etc. R. Co.*, 45 N. Y. 514.

<sup>55</sup> *Babcock v. L. S. etc. R. Co.*, 49 N. Y. 491, citing *Root v. Great Western R. Co.*, 45 N. Y. 524, and

cases cited; *Redfield on Carriers*, sec. 181, and cases cited in note 9; *Hutch. on Carriers*, sec. 271.

<sup>56</sup> 4 Burr. 2298.

by general notice. So extremely liberal did the courts become in extending their privileges to carriers that Lord Ellenborough, in *Downs v. Fromont*<sup>57</sup> in 1814, said: "I am very sorry for the convenience of trade that carriers have been allowed to limit their common-law responsibility, and some legislative measure upon the subject will soon become necessary, but I feel myself bound by the decisions, that such notices, in cases where they apply, constitute a special contract between the parties." In 1830 the statute commonly known as the Carrier's Act passed parliament. The first section of that act provides "that no mail contractor, stage-coach proprietor, or other common carrier by land, for hire, shall be liable for the loss of, or injury to, any article or articles or property of the descriptions following: (that is to say) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland and Ireland, respectively, or of any other bank in Great Britain or Ireland, orders, notes or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid, contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse or receiving-house of such mail contractor, stage-coach proprietor or other common carrier, or to his, her or their bookkeeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or

<sup>57</sup> 4 Camp. 40. So excellent a history of the English decisions and acts is given in *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, that I earnestly commend its perusal to the student of this subject.

persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." The second section provides that "when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such contractors, stage-coach proprietors and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice without further proof of the same having come to their knowledge." <sup>58</sup>

Following this statute was the act of parliament passed in 1854, known as the Railway and Canal Traffic Act, which modified the act of 1830 as applied to railways and canal traffic. The seventh section of the act, among other things, provides "that railway companies are liable for the loss or injury done to goods by the neglect or default of the company, or its servants, notwithstanding any notice limiting their liability, provided that they may make, by special contract assented to and signed by the consignor, any conditions which are adjudged by the court to be just and reasonable. The signature of the consignor or his agent is essential to the validity of the contract." <sup>59</sup>

§ 526. — **The result of this act.**—Upon these acts rest the adjudicated cases in England. It will be noticed that the sub-

<sup>58</sup> The above was stated by Story on Bailm., sec. 554a. See English notes 5 Eng. Rul. Cases, 337 where the statute is given and very many cases cited and discussed. See also notes to section 554 *et seq.*, Story on Bailments, for a general discussion;

Cole v. Goodwin, 19 Wend. 251, where Cowen, C. J., gives a full discussion of the several acts and decisions.

<sup>59</sup> Aldrich v. Great Western R. Co. (1864), 15 Com. B. (N. S.) 582; 5 Eng. Rul. Cases, 340.

stance of the provisions touching this subject is that what is "just and reasonable" is to be submitted to the courts. Very many decisions of the courts might be cited, but suffice it to say that an examination of the adjudications will discover that the courts have virtually held that it is "just and reasonable" for the carrier to limit his liability to almost any extent except as to his own negligence or that of his servants.<sup>60</sup> While the courts do not say this, or state it in their opinions, it is virtually the substance of their decisions.

<sup>60</sup> See cases cited in 5 Eng. Rul. Cas. 340, etc.; Hutch. on Carriers, § 234, and notes.

## CHAPTER IX.

### LIABILITY OF THE COMMON CARRIER (CONTINUED)—CONNECTING CARRIERS.

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| <p>§ 527. Liable only over his own line except when contract is for further liability.</p> <p>528. — If there is no contract as to liability beyond its own line.</p> <p>529. The English rule.</p> <p>530. Decisions of states not harmonious.</p> <p>531. Some conditions and relations from which contract for through shipment may be implied.</p> | <p>§ 532. Who are connecting carriers.</p> <p>533. The relations between the shipper, the initial carrier and the connecting carrier.</p> <p>534. The duty of the connecting carrier.</p> <p>535. Authority to make contract binding connecting carriers.</p> <p>536. Actions for loss or damage.</p> |
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§ 527. Liable only over his own line except when contract is for further liability.—Primarily the carrier's liability only extends to shipments over his own line, and, if he is to be held liable for loss or injury beyond his line, his liability can only be made out by proof of a contract, either express or implied, whereby he assumes such liability. Such a contract may be an express written contract, assuming liability over connecting lines and to the termination of the shipment, and, in such case, like all written contracts, it must be construed by the court; or it may, as said, be an implied contract—implied from all the facts and circumstances. Where the goods are received by the carrier marked through to their destination, and a through freight rate made and collected, the initial carrier having through shipping arrangements with the connecting carrier over whose line the goods are to be transported, a contract for through shipment by the initial carrier would be implied. In all cases where the contract is implied from facts shown upon the trial, it is a question for the jury to determine whether a contract was made which bound the initial carrier throughout the journey to the destination of the goods.

§ 528. If there is no contract as to liability beyond its own line.—In the absence of a contract, express or implied, fixing the liability beyond its own line, the carrier has a duty cast upon him by the law to safely deliver the goods into the possession of the first connecting carrier. That duty will not be fulfilled by simply carrying the goods to the end of its own line and placing them in a warehouse. The fact that they are marked through is enough to make it incumbent upon initial carrier to properly deliver them to the connecting carrier. The mere taking of the goods for shipment by the initial carrier, marked to a destination beyond its own line, is not a sufficient fact from which an implied contract to ship to destination and assume liability will be inferred. It is simply a fact, with others, to be submitted to the jury upon such a contention, but of itself alone it is not enough. The supreme court of the United States have very clearly stated the prevailing rule in this country in such like cases. The court say: "A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are intrusted to it for transportation within the course of its business to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line: that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the states. As was said in *Railroad Co. v. Manufacturing Co.*,<sup>1</sup> 'It

<sup>1</sup> 16 Wall. (U. S.) 318, 324; *My-Merchants' Dispatch, etc., Co.*, 106 106; *James S. Davis, etc. Co. v. Merchants' Dispatch, etc. Co.*, 106 Mo. App. 487, 81 S. W. 226; *Thyll v. New York, etc. R. Co.*, 87 N. Y. S. 345; *Sterling v. St. Louis, etc. R. Co.* (Tex. Civ. App. 1905) 86 S. W. 655; *Hubbard v. Mobile,*

*etc. R. Co.*, 112 Mo. App. 459, 87 S. W. 52. The mere receipt of goods marked for delivery beyond the terminus of the initial carrier's route does not import a contract to carry to that place, but in the absence of a special contract the initial carrier is only responsible to the extent of his

is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction.' This doctrine was approved in the subsequent case of *Railroad Co. v. Pratt*,<sup>2</sup> although the contract there was to carry through the whole route. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See also *Insurance Co. v. Railroad Co.*<sup>3</sup> The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."<sup>4</sup>

own route, and safe delivery to the connecting carrier. *Bisha-waite v. Penn. R. Co.*, 92 N. Y. S. 783; *Chicago, etc. R. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558; *McLendon v. Wabash, etc. R. Co.*, 119 Mo. App. 128, 95 S. W. 943. The mere statement of the clerk of the initial carrier that the goods will be sent through to destination held not sufficient evidence of contract for though shipment. *Welse v. St. Louis, etc. R. Co.*, 97 N. Y. S. 993. But if initial carrier receives goods marked through and collects freight through he is liable through and if by contract agrees to deliver to a certain connecting carrier and delivers to another he is liable. *Eckles v. Missouri Riv. R. Co.*, 112 Mo. App. 240, 87 S. W. 99;

*Graham & Ward v. Macon, etc. R. Co.*, 120 Ga. 757, 49 S. E. 75.

<sup>2</sup> 22 Wall. 123.

<sup>3</sup> 104 U. S. 146.

<sup>4</sup> *Myrick v. Railroad Co.*, 107 U. S. 102; also *Ill. Cent. R. Co. v. Carter*, 165 Ill. 570, 36 L. R. A. 527. In the case of *Nutting v. Connecticut River R. Co.*, 1 Gray, 502, the receipt was, "Received of E. Nutting for transporting to New York nine boxes of planes marked, etc." (naming the goods.) The boxes were delivered by the initial company at the terminus of their road to the N. H., etc. R. Co., and afterwards to the N. Y., etc. R. Co., which extends to the city of New York. A receipt was taken by the defendants for the freight from the first connecting carrier; the boxes



§ 529. **The English rule.**—The English rule differs from the rule just stated and discussed in this: that from the very act of receiving, by the initial carrier, goods directed beyond its own route, a contract for through shipment is implied, and to exempt itself from liability beyond its own line the carrier must obtain from the shipper an express contract relieving him from such responsibility. This rule is said to be founded upon the early case of *Muschamp v. Lancaster, etc. R. Co.*,<sup>5</sup> but it would seem that this case, from the opinion of Lord Abinger, does not go to the extent of upholding the rule as stated. At most it but decided that the accepting of the freight directed to a point beyond the carrier's line is *prima facie* evidence of a contract, and that expression of the court was hardly meant to be as broad as the construction usually put upon it. The court distinctly say that the whole question is one for the jury; that the fact of the goods being marked to be sent beyond the carrier's line, and that the charges for the entire distance were stated, are to be considered; and the court in summing up the matter say: "The whole matter is therefore a question for the jury to de-

were all delivered in New York except two which were lost between Springfield and New Haven. The court say: "What, then, is the obligation imposed on them by law, in the absence of any special contract by them, when they receive goods at their depot in Northampton which are marked with the names of consignees in the city of New York? In our judgment, that obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carriers, to be forwarded towards their ultimate destination. This the defendants did, in the present case, and in so doing performed their full legal duty. If they can be held liable for a loss that happens on any railroad besides their own, we know not what is the limit of their liability. If they are liable in this case, we do not see why they

would not also be liable, if the boxes had been marked for consignees in Chicago, and had been lost between that place and Detroit, on a road with which they had no more connection than they have with any railway in Europe. But the plaintiff seeks to charge the defendants on the receipt given by Clarke, their agent, as on a special contract that the boxes should be safely carried the whole distance between Northampton and New York. We cannot so construe the receipt. It merely states the fact that the boxes had been received 'for transportation to New York.'" The court further in the opinion discussed the case of *Muschamp v. Lancaster, etc. R. Co.*, 8 M. & W. 421, and said: "We cannot concur in that view of the law." (Citing cases.) *Gray v. Jackson*, 51 N. H. 9.

<sup>5</sup> 8 M. & W. 421.

termine what the contract was on the evidence before them. . . . In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which *prima facie*, must be made of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as conclusive evidence of the contract sued on by the plaintiff; it is only *prima facie* evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better that those who undertake the carriage of parcels for their mutual benefit should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward."

The court does not attempt to lay down any decisive principle that is to govern in such like cases; at most it but decides that it is a question of fact for the jury; that if not objected to, if no proofs to the contrary are adduced, the accepting of the goods under such circumstances would be *prima facie* proof of the intention of the carrier to transport them to their destination. But supposing the carrier had shown upon the trial of other cases other circumstances, or had shown a conversation between the agent of the carrier and the shipper which would contradict the claimed presumption, and the jury had believed that there was no intention to assume responsibility; under this opinion if the case had been so stated, a verdict exactly opposite to the one under consideration could have been sustained. So it may be concluded that the difference between the American and English rule is not so very great, for in this country it is a question for the jury if an implied contract is claimed. The difference, therefore, can be said to be that under the English rule the receiving of the goods directed to a point beyond the carrier's line is *prima facie* evidence that the initial carrier had assumed the responsibility of the entire transportation of the goods, but this presumption may be rebutted; while in the United States the receipt of goods under such circumstances does not fix any such liability upon the carrier, and does not even make out a *prima facie* case.

§ 530. Decisions of states not harmonious.—The decisions of the states are not entirely harmonious. Some of them have adopted the English rule, so called, holding that where property is delivered to the carrier for shipment directed to a destination beyond its line, and the carrier accepts the goods for shipment,

it is *prima facie* evidence of an implied contract that the initial carrier will assume liability beyond its own line, and in order to be excused from such liability the carrier must obtain a contract from the shipper to that effect;<sup>o</sup> while others of the states, and a

<sup>o</sup> *Wabash, etc. R. Co. v. Jag-german*, 115 Ill. 407. The court say: "It is a well settled doctrine in this state that where a common carrier receives goods to carry, marked to a particular place beyond his line, he is bound under an implied agreement from the marks and directions to carry to and deliver to that place, although it be a place beyond his own line of carriage." Ill. Cent. R. Co. v. *Copeland*, 24 Ill. 332; Ill. Cent. R. Co. v. *Frankenberg*, 54 Ill. 88. If goods are delivered to a common carrier marked for a place beyond the terminus of its line and it receives the goods to carry, the carrier is bound by the common-law rule to carry them, and if they are lost to account to the owner for their value. *Chicago & N. W. R. Co. v. Monfort*, 60 Ill. 175; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239; *Wabash R. Co. v. Harris*, 55 Ill. App. 159; *Angle & Co. v. M. & M. R. Co.*, 9 Iowa, 487. In *Mulligan v. Ill. Cent. R. Co.*, 36 Iowa, 181, the court say: "Upon this question there is a striking lack of uniformity in the decisions. There are three views which have been maintained by their respective advocates with perhaps equal cogency of reasoning: First. That where carriers receive and receipt for goods consigned to a point beyond the terminus of their road, without any special contract respecting the same, the agreement is one for transportation the whole distance, upon

which the first carrier may be sued for a loss occurring after the goods have passed beyond the terminus of its road. The first case which has generally been cited as announcing this doctrine is *Muschamp v. Lancaster R. Co.*, 8 M. & W. 421, decided in the court of exchequer in 1841, followed and reinforced in *Collins v. Bristol & Exeter R. Co.*, 11 Exch. 790, and extended even to goods booked beyond the limits of England. . . . Second. That where a carrier receives goods marked for a particular destination beyond the terminus of its line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over its own line, and forward, according to the usual course of business, from its terminus. See *McMillan et al. v. M. S. & N. I. R. Co.*, 16 Mich. 120; *Van Santvoord v. St. John, & Hill*, 157; *Farmers' & Mechanics' Bank v. Champlin Transp. Co.*, 23 Vt. 186; *Britnall v. Saratoga & Whitehall R. Co.*, 32 Id. 665; *Hood v. N. Y. & N. H. R. Co.*, 22 Conn. 1, 502; *Elmon v. Naugatuck R. Co.*, 23 Id. 457; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Id. 468; *Nutting v. Connecticut River R. Co.*, 1 Gray, 502; *Burroughs v. Norwich & W. R. Co.*, 100 Mass. 26; *Darling v. Railroad Co.*, 11 Allen, 295; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Jemison v. Camden & Amboy R. Co.*, 4 Am. Law Reg. 234; *United States Exp. Co. v.*

great majority of them, hold to the rule that this does not create an implied contract, and that the initial carrier does not become liable beyond its own line except by a contract, either or implied, assuming such liability.<sup>7</sup>

Where the contract is not in writing, the question as to whether the initial carrier is to carry the freight beyond its own line, assuming the liability incident to the carriage, seems by the weight of authority to be a subject for proof; and where in an action against a carrier to recover for the loss of plaintiff's horses by fire while on the line of a connecting carrier, it was claimed that defendant only contracted for carriage to the end of its line, but

Rush et al., 24 Ind. 403; Pennsylvania Cent. R. Co. v. Schwarzenberger, 45 Pa. St. 208; Rome R. Co. v. Sullivan, Cabot & Co., 25 Ga. 228. Third. That the mere acceptance of goods by a common carrier marked to a designation beyond the terminus of its line as a matter of law imports no absolute undertaking upon the part of the carrier beyond the end of its road, but is a matter of evidence to be submitted to the jury, from which, in connection with other evidence produced, they are to determine, as a question of fact, the real engagement entered into. This position was very ably maintained in a recent and elaborate opinion of the supreme court of New Hampshire, reviewing almost the whole current of decisions from *Muschamp v. Lancaster Ry. Co.*, 8 M. & W. 421, down to the present period. See *Gray v. Jackson*, 51 N. H. 9. The question is not an open one in this state. In *Angle v. M. M. Ry. Co.*, 9 Iowa, 487, the rule was settled as it is understood to exist in England, and it was held that the acceptance by a carrier of goods marked to a designation beyond the terminus of its road creates a *prima facie* liability to

transport to and deliver at that point, which may be modified by proof of a different usage known to the shipper at the time of making the consignment. The court did not err, therefore, in the first branch of the foregoing instruction, as applied to the evidence introduced, there being no proof that plaintiff knew of a usage of the defendant not to transport freight beyond Cairo."

<sup>7</sup> *Grover & Baker Co. v. Railroad Co.*, 70 Mo. 672; *Knott v. Railroad Co.*, 98 N. C. 73; *Detroit, etc. R. Co. v. McKensie*, 43 Mich. 609; *Rickerson v. Railroad Co.*, 67 Mich. 110; *Myrick v. Railroad Co.*, 107 U. S. 102. See cases, *Hutch. on Carriers*, secs. 148, 149, note. "When a carrier receives goods consigned beyond its line within a special contract, it is liable only to carry safely to the end of its own line and so deliver to the next carrier on the usual route." *Harris v. Grand Trunk R. Co.*, 15 R. I. 371, 5 Atl. 305; *Hunter v. S. Pac. R. Co.*, 76 Tex. 195; *McConnell v. Norfolk & W. R. Co.*, 86 Va. 248; *Ortt v. Minneapolis, etc. R. Co.*, 36 Minn. 396; *Crawford v. Southern R. Ass'n*, 51 Miss. 222.

it appeared that plaintiff had for a number of years made like contracts with defendant on which stock had been carried through to the destination, and that the contract in question recited that the stock was received for shipment to the point of final destination, and the charges fixed by defendant were for through carriage, it was held sufficient to show a contract of through carriage.<sup>8</sup>

§ 531. **Some conditions and relations from which contracts for through shipment may be implied.**—In the absence of an express contract for through shipment on the part of the initial carrier, or for shipment and liability over its own line only, and for delivery to the succeeding carrier, the contract for through shipment and liability of the initial carrier, if it exists at all, must be implied; and, as we have seen, must in all cases depend upon facts and circumstances, and is a question for the jury. While it is difficult to conceive of such a contract being held to exist as matter of law, the courts have freely sustained judgments based upon evidence of facts which imply that such a contract existed.

Where the carrier accepted a carload of freight for transportation and gave a receipt stating it was consigned to a designated point and contained the figures "62.20," the point named being beyond the defendant's line, and there was evidence that "62.20" was the freight for the entire distance, prorated among all the connecting companies, this was held to constitute a through contract of shipment.<sup>9</sup>

Where it appeared that the plaintiff had for many years been in the habit of transporting horses over defendant's road to Boston, which was beyond the defendant's line; that the station agent at the point of shipment had been such agent for five or six years, and that nearly a week before he had engaged to give plaintiff two good cars for the final shipment to carry the horses to Boston, the place of destination, and that the cars furnished by the station agent of the defendant had always gone over the connecting line and delivered the freight in Boston; that the arrangements made were recognized by the company; that the office of the agent was in the railroad company's freight office; that the plaintiff paid the freight through, sometimes at the

<sup>8</sup> Ogdensburg R. Co. v. Pratt, Fruit & Vegetable Exchange, 91 89 U. S. (22 Wall.) 123.

Ga. 389, 17 S. E. 904.

<sup>9</sup> Cent. R. & Banking Co. v. Ga.

point of making the shipment and sometimes at the destination; that on the occasion in question he agreed with the defendant's station agent upon the price through to destination; that a way-bill was made out for the freight and cars through at the price agreed upon; that the price agreed upon was not paid, but might have been,—in such case the court say: "We see no sound objection to the admission of this way-bill as evidence. If a written contract, it was not only evidence, but the best evidence of what the contract was. It was exhibited to Pratt (the plaintiff), before the cars were started, as a part of the transaction. If not a contract, it was an act done and a declaration made by the agent in the very act of transacting the business and as a part of it, which brought it within the principle of the *res gesta*. This evidence shows that the oral engagement was to carry his horses to Boston, not to carry to Rouse's Point and thence to forward to Boston, but to carry as well and as fully over the Vermont and Massachusetts roads as over the Odgensburg road. Again, a specific price was agreed upon for transportation over the whole route. This was in accordance with the practice, and whether paid at Pottsdam or at Boston was unimportant. This practice had been continued for years, and the jury had the right to hold the contract to be the same without reference to prepayment or postpayment. The jury were justified in inferring that, where a carrier fixes a price for transportation over the whole route, that he makes the entire contract his own. One who carries simply over his own line and thence forwards by other lines would ordinarily, the jury may say, make or collect his own charges and leave the remaining charges to be collected by those performing the remaining services. Receipt of the entire pay affords a fair presumption of an entire contract."<sup>10</sup>

And so it may be said that the evidences of joint liability are a through bill of lading; through charges for the goods carried; the goods shipped so as to be carried through without change of cars; a sharing of profit and loss with connecting companies; the

<sup>10</sup> Railroad Co. v. Pratt, 22 Wall. 123, 132. In Root v. Great Western R. Co., 45 N. Y. 524, in speaking of the contract to transport as a common carrier over other lines, the court say: "Such an undertaking may be established by express contract, or by

showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through."

holding out to the public by the initial carrier that it will be carried through to destination beyond its own line. These, with other circumstances that might be enumerated, also evidence an intention upon the part of the initial carrier to contract for through shipment.<sup>11</sup>

§ 532. **Who are connecting carriers.**—The term “connecting carrier” is used in contradistinction to the term “initial carrier” or “first carrier.” It may be said, then, that a connecting carrier is a carrier between the initial carrier’s line and the destination of the goods, and so there may be one or more connecting carriers.<sup>12</sup>

§ 533. **The relation between the shipper, the initial carrier and the connecting carrier.**—The relation between the shipper, the initial carrier and the connecting carrier depends entirely upon the contract for shipment. Was it a contract for through shipment by the initial carrier, or simply for shipment over its line and delivery to the connecting carrier? If the contract with the initial carrier was for shipment of the goods over connecting lines through to their destination, then, in that case, the connecting carriers are but the agents or servants of the initial carrier; they transport the goods for the initial carrier. But even if this be so, the shipper, as we shall see, may hold the connecting carriers responsible for any loss or injury to the goods that results from their negligence or failure to deliver the property in as good condition as when received by them; or the shipper may hold the initial carrier for damage or loss wherever it may happen during transportation under the contract of shipment. If the contract with the initial carrier was simply to ship the goods over its own line and deliver them to the connecting carrier, then the initial carrier is the agent of the shipper in the matter of delivering the freight to the connecting carrier, and, if there is more than one, the first connecting carrier becomes the agent of the shipper for the delivery of the goods to the second carrier, and so on to the end of the shipment. And so each shipment or delivery to a connecting carrier is in fact a shipment or delivery by the shipper himself through his agent; and when the initial carrier in such case, or the connecting carrier,

<sup>11</sup> *International, etc. Co. v. Tisdale*, 4 L. R. A. 545; *Shewalter v. Mo. Pac. R. Co.*, 84 Mo. App. 589.

<sup>12</sup> *Mansen v. Jacobs*, 12 Mo. App. 125, 93 Mo. 331.

has delivered the goods in as good condition as when received to the succeeding carrier, or the consignee, and without delay, the carrier thus delivering the property is relieved from further responsibility.<sup>13</sup>

§ 534. *The duty of the connecting carrier.*—The duties devolving upon the connecting carrier are the same as those incumbent upon the initial carrier. He is bound to receive the goods of all who apply to him for shipment, if in the line of his business as a carrier, and it makes no difference whether the goods are presented by an initial carrier, who has become liable for a contract for through carriage of the property, or by the initial or connecting carrier as the agent of the shipper; his liability is the same as though he received the goods from the shipper direct; and if he would relieve himself of the extraordinary liability he must do so by contract at the time of receiving the property for shipment.<sup>14</sup> It is the duty of the connecting carrier to carry the goods safely over his line and deliver them to the next connecting carrier, or to the consignee if they have arrived at their destination. For any delay upon his own line, or in delivery to the next connecting carrier, he is liable. Simply unloading the goods upon the dock or platform, or putting them into a warehouse at the end of his line, is not a delivery to a connecting carrier that will relieve him from responsibility.<sup>15</sup> Nor can the initial or connecting carrier relieve himself from liability by de-

<sup>13</sup> In *M. H. O. R. Co. v. Kirkwood*, 45 Mich. 51, it was held "a carrier of goods acts as the agent of the consignee in transferring them to another carrier, and not as the latter's agent."

<sup>14</sup> 2 In *Goodwin v. Southern Ry. Co.*, 125 Ga. 630, it was held the connecting carrier could not be held for damages in refusing to deliver goods until a larger amount of freight was paid than that contracted by the initial carrier, holding that initial carrier had no authority to make such contract. And it is generally held that connecting carriers may under such circumstances charge more freight and have a

lien therefor. See note, 5 Am. and Eng. Ann Cases, pp. 576, 7, 8.

<sup>15</sup> 1 Mich. Digest, sec. 44. "A common carrier's liability for freight that is to be transferred to another carrier continues until it is so transferred, or at least until such notification has been given to the other carrier as amounts to a tender of delivery. And if the first carrier merely stores the freight in a warehouse of its own, where the other is in the habit of taking it at its convenience, and the freight while so stored is destroyed, the first carrier is answerable for its value." *Condon v. M. H., etc. R. Co.*, 55 Mich. 218.



livering the goods to or forwarding them by some other connecting carrier than the one designated and stipulated for in the contract of shipment.<sup>16</sup> There must be an actual delivery of the goods, or an offer to deliver to the succeeding carrier, and if the succeeding carrier refuses to accept them and transport them over his line he must at once report that fact to the owner, or person, or company from whom he received the goods, and if delay is occasioned, or loss or damage is the result of the failure to so report while the goods are thus held, because of the refusal to receive them as aforesaid by the succeeding carrier, the carrier will be liable as a warehouseman.<sup>17</sup> Nor will delivery of the goods to the connecting carrier be alone sufficient to relieve either the initial carrier or succeeding carrier who delivers them from liability, if loss or injury occurs by reason of a deviation from

<sup>16</sup> *Strong v. Certain Quantity of Wheat*, Fed. Cases No. 13,541. "Non-performance of the carrier's contract to transport live-stock to an extraordinary terminal point is not excused by the fact that the connecting line over which the shipment was to be carried was prevented by a mob from doing business." Where goods are not shipped by the consignor in accordance with the directions of the buyer, and are deposited at the end of the carrier's road and he refuses to deliver them to the connecting line on the ground that the liability of the latter is greater than the exemptions contained in the original contract, and while on deposit they are destroyed by fire, without notice given to the consignor, the carrier is liable for the loss. *Rawson v. Holland*, 59 N. Y. 611, 18 Am. Rep. 394. In *Memphis, etc. R. Co. v. Stockard*, 58 Tenn. (11 Heisk.) 568, it was held a railroad company is liable for its failure to deliver freight at a place beyond its own line and on the line of the connecting

carrier, in the absence of a special contract limiting its liability, though the connecting carrier refuses to receive the freight and advance freight charges due the first carrier. *Johnson v. N. Y. Cent. R. Co.*, 39 How. Pr. 127; *East. Tenn., etc. R. Co. v. Nelson*, 1 Coldwell (Tenn.) 272.

<sup>17</sup> In *American Sugar Refining Co. v. McGhee*, 96 Ga. 27, it was held that "where goods are shipped over the lines of connecting railways to a consignee designated in the bill of lading, and on arrival at designation the receivers of the railway company which completed the transportation tendered delivery to that consignee and he declined to receive the goods, the liability of the receivers as common carriers thereupon ceased, and they became liable as warehousemen only, and as such were chargeable with the duty of notifying the consignor of the consignee's refusal to accept the goods, with the further duty of holding the same subject to the order of the consignor."

the initial contract, if the initial or connecting carrier who thus delivers the goods fails to inform the connecting carrier fully as to the terms of the shipment; so it may be said to be the duty of the carrier who makes such delivery to inform the connecting carrier at the same time fully as to the terms of the contract of shipment.<sup>18</sup>

**§ 535. Authority to make contract binding connecting carriers.**—The business of the common carrier is generally carried on through agents, and, as we have seen, the initial carrier who makes a through contract for rates and carriage beyond its own line, especially where its liability is limited to its own line, and assumes liability only to deliver the goods to the connecting carrier, acts in the matter of making the through rate or the time for transporting the goods, or as to any other stipulation, as the agent of the connecting carrier. But as the business of making the shipment, at the point where the goods are shipped, is transacted usually, if not always, by a station agent or freight agent of the initial carrier, the question has been raised, Has such an agent of the initial carrier authority to make a contract that will be binding upon the connecting carrier? The initial carrier, or its general agent, it is said, may make such a contract, especially where there are shipping arrangements between the roads; but how about this agent of the agent of the connecting carrier making such a contract—the station agent of the initial carrier binding the connecting carrier?

It would seem, on principle, that the station agent, even if he be held as acting as a sub-agent of the connecting carrier, would be able to bind the connecting carrier upon the ground that the making of the contract to carry the goods, and the making of the rate, or the making of any other stipulation, if not extraordinary and unusual, must be held to be simply an incident to the business of making the shipment, and the law will presume that a principal must expect that this kind of work will be done by sub-agents appointed by the initial carrier; that because of the modern and usual manner of doing business, which is well understood by connecting carriers and by the public, it may be said

<sup>18</sup> And in *Lesinski v. G. W. D. Co.*, 10 Mo. App. 134, it was held that where a carrier agreed after transporting goods to deliver them to another carrier, and the

latter refused them, the former did not fulfill its duty by storing the goods, but that notice should have been sent either to consignor or consignee.

that the connecting carrier knows that it is necessary, in order to transact the business, that the initial carrier shall employ agents to perform this duty at the several points of shipment.

There is another principle of the law of agency very prominently in view that may be invoked in this class of cases. The general public have rights in the matter. It is generally known, in fact it is a matter of common knowledge, that railroad companies and other carriers, whether initial or connecting carriers, are anxious to carry the goods that are being shipped. Often they have special agents operating at places off their line of road soliciting the carriage of the freight that is offered. Shippers know that ordinarily the arrangements for shipping are made by the agents at the several stations; that through shipments made by them are accepted by connecting roads, and the goods carried to their destination. So it can be said, and there can be no doubt, that because of the general course of the business, so far as the public and the general understanding of the shippers are concerned, these agents have at least apparent authority to act not only for their own company, but for connecting lines, and public policy will not allow a connecting carrier to defend upon the ground that such agents do not have authority to act unless the contract made by them is unusual or fraudulent. The public's interest must be subserved, and the law will demand that in this business the usual and generally understood procedure shall be binding upon the carriers.

In *Rudell et al. v. Ogdensburg Transit Co.*<sup>19</sup> the court, quoting from *Lawson on Carriers*, say: "As common carriers, especially at the present day, transact the greater part, if not all, of their business with the public through agents and servants, it is plain that the public have a right to assume that they are authorized to do whatever they attempt to do" The court further say: "This rule does not include contracts so unusual and extraordinary that they cannot reasonably be included within the general authority."

**§ 536. Actions for loss or damage.**—The question, against which of the carriers shall the owner of the goods bring his action, in case of loss or injury, where the shipment has been over several lines, has been very much discussed both in this country and in England, and there is by no means harmony among the decisions upon this question.

<sup>19</sup> 117 Mich. 508; *Lawson, Con. of Carriers*, § 229.

The decisions seem to group themselves under three distinct holdings. *First*, that where goods have been injured, the consignee or consignor may bring his action against the initial carrier and hold him liable for the loss or injury. In the absence of an express contract the English courts hold to this theory, maintaining that there is a presumption that the first carrier is liable, and this even though it refused to take pay for continuous shipment or for any shipment beyond its own road, holding that the acceptance of the goods and the shipment of them to their destination, without positively limiting his liability by contract, was *prima facie* an undertaking to carry them to their destination. *Second*. A second class of authorities holds that the last carrier is liable, and that the action may be brought against him; this being upon the presumption that the goods must have been received in good order when they came to the line of the last carrier. As where goods in a box were shipped by three successive carriers, and when delivered to the consignee, although there were no external indications of the fact, the box was found to have been opened and certain goods abstracted therefrom, it was held that the jury may presume, in the absence of evidence to the contrary, that the box remained unopened until it came into the possession of the last carrier, and that the loss occurred through its fault. The court say: "As the common carrier next in order, the defendant was bound to receive and transport the boxes when tendered. It was bound to receive them in the condition in which they were. It had no means of investigation or inquiry into their contents. It had no right to open the boxes or examine what they contained, and, if it had, could not have detected the loss by such examination, and so have refused to receive and carry. It must take the boxes as they were, with no external signs or appearances of breaking or injury, and nothing to give warning that the cloths had been previously abstracted or removed, and carry them forward to their place of destination. Under these circumstances, the rule or presumption of law which makes the defendant liable for the value of the goods, unless (what seems quite impossible to be done) it shows where the loss actually took place, must be supported by most clear and satisfactory reasons of policy or necessity, or otherwise it should be rejected. It must be shown that greater injustice or more certain injustice will ensue from its rejection than will or may follow from its adoption. I have been, as I have said, in

very considerable doubt; but examination convinces me that there are such reasons, and that both principle and authority sustain the presumption. The very uncertainty which exists as to when or where the cloths were taken out, or in whose custody the boxes then were, and the difficulty or impossibility of ever ascertaining those facts, make the presumption absolutely necessary. What is difficult or impossible for the defendant to find out with respect to the breaking and larceny is still more difficult or impossible for the plaintiffs. The defendant possesses means and facilities which the plaintiffs do not. To say that the plaintiffs shall not recover because they have not ascertained and proved that the cloths were taken while the boxes were in the custody of the defendant, is, in effect, to say that they are without remedy in the law for their loss. If required to make such proof to establish a cause of action against this company, then the same proof would be required in a suit against either of the others, and the plaintiffs could not recover against any, although it is certain that one of them is or should be responsible for the loss. If the plaintiffs knew or could prove in whose custody the boxes were when the cloths were taken, there would be no hardship, perhaps, in requiring them to sue that company. But the plaintiffs do not know, nor is it possible for them to ascertain this, and, unless aided by presumption, they are without remedy, which is a positive and certain injustice. I know of no more reasonable or proper presumption to apply than that here invoked." <sup>20</sup> *Third*. A third class of decisions

<sup>20</sup> *Laughlin et al. v. Chicago & N. W. Ry. Co.*, 28 Wis. 204, 210. The court further say: "The difficulties, nay even impossibilities, by which owners would be beset if put to the task of ascertaining where their packages or boxes were broken open and contents plundered when in transit over our long routes, are well known, and are illustrated by the facts in this case. They are also portrayed by Chief Justice Perley in *Lock Co. v. Railroad Co.* (Sup. Ct. N. H.), 10 Am. Law Reg. (N. S.) 260, 263; by Waite, C. J., in *Elmore v. Naugatuck R. Co.*, 23

*Conn.* 482; and by Smith, J., in *McDonald v. Western R. Co.*, 34 N. Y. 501, 502. In the first named case the chief justice says: 'Any rule which should have the effect to defeat or embarrass the owner's remedy would be in direct conflict with the principles and the whole policy of the common law.' I am of the same opinion. I think this is no time to relax the stringent and wholesome rules of the common law, and must hold that the doctrine of presumption was rightly applied by the court below in aid of the plaintiffs in this case." *Faison v.*

holds that there is no presumption as to where the goods were lost or injured, but that it is a subject of proof, and that the plaintiff in order to recover must show which of the carriers was liable for the injury.

A case that is often quoted and is well reasoned out is the case of *M. H. & O. Co. v. Kirkwood*,<sup>21</sup> the court holding that the plaintiff is bound to show affirmatively that the goods were delivered in good order to the carrier whom he seeks to make liable for the injury; for example, if the last carrier is sued, that the plaintiff must show that he received the goods in good order, and that there is no presumption that would relieve the plaintiff from such proof. In the case under discussion the goods were shipped in New York, turned over at Buffalo to the Lake Superior Transit Company, and delivered by the transit company at Marquette to the railroad company, the last carrier, against whom the action was brought. The court below charged the jury that if the goods were delivered in New York in good order to the first carrier, they would have a right to infer that they continued so when received by defendants, unless evidence was given which showed the contrary.

The court held this charge to be erroneous, and that the plaintiff was bound to show affirmatively that the goods were delivered in good order at Marquette to the defendants. The court say: "We think this rule is just, and are not at all disposed to depart from it. A carrier has no means in a case like this of opening packages and examining their contents. Unless there is some outward token which is suspicious, he may and must take the

Railroad Co., 69 Miss. 569; Railroad Co. v. Brewing Co., 96 Tenn. 677, holding that there is a presumption that when the goods are received in good order they ought to be in good order to the last carrier. *Evans v. Atlanta, etc. R. Co.*, 56 Ga. 498. Goods received by a railroad company and delivered over its own road are presumed to have been received in good order if nothing appears to the contrary. *Cent., etc. R. Co. v. Bayer*, 91 Ga. 115; *Forester v. Railroad Co.*, 92 Ga. 699, 96

Ga. 428. "Presumed that goods reached last carrier in as good condition as when delivered to first carrier." *Shriver v. Railroad Co.*, 24 Minn. 506, 34 Am. Rep. 353; *Leo v. Railroad Co.*, 30 Minn. 438; *Flynn v. Railroad Co.*, 43 Mo. App. 424; *Smith v. N. Y. Cent. R. Co.*, 43 Barb. 225, 41 N. Y. 620; *Dixon v. Railroad Co.*, 74 N. C. 538; *Railroad Co. v. Pratt*, 22 Wall. 123.

<sup>21</sup> 45 Mich. 51; *Rolfe v. Lake Shore, etc. R. Co.*, 144 Mich. 169, 107 N. W. 899.

articles and forward them on the usual terms. He is bound in law to deliver them in the condition in which he receives them. But there can be no further responsibility; and any rule of law which would make him responsible actually or presumptively for the conduct of previous independent carriers would be grossly unfair, and subject him to losses against which he could have no protection. He has nothing to do with any of the previous dealings with the property, and no means of informing himself about them. We cannot see how this case is different from what it would have been if the plaintiffs themselves had delivered the boxes to the company at Marquette. In law the transit company acted merely as plaintiff's agent in turning them over, and cannot be treated as representing the Marquette Railroad Company for any purpose without reversing the whole order of business. . . . The presumption that things remain unchanged applies in such a case as the present just as forcibly backward as forward. It may quite as reasonably be presumed that the goods were delivered at Negaunee and Ishpeming, in the condition in which they were received at Marquette, as that they came to Marquette as they left New York. The goods were certainly damaged when they reached their destination. To assume that they were damaged after they left Marquette, and not on any of their previous removals, is to make a very arbitrary assumption which has no more foundation in probability than any other. If it were worth while to enlarge on what is confessedly a presumption not resting on any sure foundation in experience, it might very well be questioned whether such a presumption is admissible at all as applied to things, the position of which does not remain either fixed in place or free from disturbance by human agencies. But we need not enlarge on this because the nature of the suit itself raises different presumptions which are well recognized. This suit is based on the negligence of the carrier. It can only be maintained on the theory that the carrier or its servants did not properly care for or handle the goods. There is no rule better established or more righteous than the rule that any one who claims a right to damages for negligence must prove it. The presumption that a party sued has done no wrong must prevail till wrong is shown. A carrier's obligation to carry safely what he received safely is independent of care or negligence. But in the absence of proof that there was property

delivered to him, or safely delivered to him, any presumption that he received it is one which goes beyond and behind the duty of a carrier and enters into the origin and making of the contract. Until such property comes into his hands there is nothing for a contract to act upon, and the contract is not proved until that is proved." <sup>22</sup>

It would seem, however, that the great weight of authority in the United States is, that the plaintiff may bring his action against the last carrier, and that the court may presume that the goods were received by him in good condition, and that the burden of proving otherwise is upon the carrier.

<sup>22</sup> *Gilbert v. Dale*, 5 Adol. & El. 543; *Mildand Ry. Co. v. Bromley*, 17 Q. B. 372; *Farmington Co. v. Railroad Co.*, 166 Mass. 154; *Orr v. Chicago, etc. Co.*, 21 Mo. App. 333; *Cavallo v. Tex. Pac. R. Co.*, 42 Pac. 918.<sup>1</sup>



## CHAPTER X.

### COMPENSATION, DISCRIMINATION AND LIEN OF THE CARRIER.

#### § 537. Compensation.

- 538. Amount depends generally on goods delivered.
- 539. Carrier's special security in and right to possession of goods.
- 540. — Carrier may protect his possession.
- 541. — The carrier may insure the goods.
- 542. — When can the carrier sell the goods.
- 543. The amount charged.
- 544. Right of carrier to collect its advances to connecting carriers.
- 545. Who is liable to the carrier for the freight.
- 546. Where the freight is only carried a part of the distance contracted for—*Pro rata itineris*.
- 547. Where goods shipped against the will of the owner, as by one not having the right to ship.

#### AS TO DISCRIMINATION.

- § 548. Law forbidding applies to all branches of carrier's business.
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- 550. The discrimination that is forbidden.
- 551. — Regulation by statute of states.
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#### THE LIEN OF THE CARRIER.

- 553. Similar to lien of the bailee —Special, not general.
- 554. When does the lien attach.
- 555. When shipment made by one without authority.
- 556. For what charges will the lien attach.
- 557. The contract for shipment must be fulfilled.
- 558. The lien how lost, satisfied or discharged.
- 559. — Lien satisfied.
- 560. — Lien discharged.

§ 537. Compensation.—Because of the contract creating the relation the carrier has a right to compensation for carrying the goods, and may, as a condition precedent to receiving them for carriage, demand that he be paid reasonable charges for transportation; but the right to prepayment is waived if not so demanded. The compensation for carrying the goods may be collected by the carrier by an action against the party liable for the payment, but in such an action the shipper or consignee (defendant) may recoup for any failure upon the part of the carrier which has resulted in damage to the goods, or for failure to deliver as contracted, and offset such damages against the

carrier's claim. And he may assert and have the same right and privilege against the claim of the carrier for damages where there is no special contract, for unreasonable delay, or for injury or damage.<sup>1</sup>

§ 538. Amount depends generally on goods delivered.—As a general rule, and with but very few exceptions, it may be said that the carrier can only collect compensation for the carrying of the goods actually delivered to the consignee; but it will be seen that this rule should not be universal or without exception, for it may be that he has been prevented from making full delivery of the goods because of some fault of the shipper or the consignee. And where the carrier had carried a cargo of coal to the place of destination and offered to deliver it, but the owner was not ready to receive it, and it was left on board the plaintiff's vessel, which, after waiting several days for an opportunity to discharge her cargo, was carried away by a freshet and her cargo lost overboard, so that it could not be delivered to the owner, it was held that the plaintiff's contract as a carrier had been performed, and he was entitled to recover the stipulated freight being liable only for the want of ordinary care after the offer to deliver.<sup>2</sup>

But where the carrier was prevented from delivering the freight, which by law he was bound to deliver, because of the act of God, it has been held that even in such case he could only recover for the freight actually delivered, the court saying: "He (the carrier) was therefore excused from delivering that part of the cargo which was destroyed by inevitable necessity, but he could recover freight only for that portion delivered. As to the part destroyed, the owner must lose the goods and the carrier the freight."<sup>3</sup>

<sup>1</sup> Hutchinson on Carriers, sec. 443; The Success, 7 Blatch. 551. In Hinsdell v. Weed, 5 Denio, 172, where the carrier contracted to carry flour from Buffalo to Albany, and in the course of the trip he lost part of the flour and sold his boat, the remainder of the cargo being on hand, it was held: If the directions of the consignors to the consignee, as contained in or annexed to the bill of lading, be to pay freight only on the de-

livery of all of the property shipped, the delivery of the whole will be a condition precedent to the recovery of the freight against the consignee, though he accept and receive a part, and that the consignee might recoup the damages on account of the property not delivered in the action against him for freight.

<sup>2</sup> Clandaniel v. Tuckerman, 17 Barb. 184.

<sup>3</sup> Price v. Hartshorn, 44 Barb.

Where a carrier carried goods to a particular place under a contract, but, before the owner had an opportunity to receive them, a part of them were lost without the fault of the carrier, it was held that the carrier was not entitled to any compensation for the carrying of the goods lost.<sup>4</sup> And where by contract the shipper assumed all risk and loss of its property by fire while in charge of the carrier, it was held that the carrier was not entitled to recover freight on property destroyed by fire before delivery to the consignee.<sup>5</sup>

§ 539. **Carrier's special security in and right to possession of goods.**—The carrier, it will be remembered, is the bailee of the goods delivered to him for transportation; and more than that, having accepted them for carriage, and having performed service in that respect, he has a special interest in the goods at least to the extent of his service, and so has a right to the possession of the property, and while so possessing it as a carrier and bailee may defend his possession against any one who undertakes to deprive him of it in violation of his bailment rights, even against the owner himself if he should take it from him without discharging the carrier's lien for compensation, or in violation of his rights under his contract for carriage.<sup>6</sup>

§ 540. — **Carrier may protect his possession.**—The carrier is, during the time the goods are in his possession as carrier, subrogated to all the rights of the owner so far as caring for the goods and having the right to defend the possession of them;<sup>7</sup> and so if the goods are stolen or injured the law will recognize this right in the carrier to protect them. If stolen, ownership of the goods by the carrier may be alleged in the indictment for larceny.<sup>8</sup> The carrier may recover the possession if wrongfully taken from him by replevin or trover, and it is said in an action of trover he will be permitted to recover a judgment for the

655, 668; affirmed, 44 N. Y. 94, 4 Am. Rep. 645; *Harris v. Rand*, 4 N. H. 259. Where a part of a cargo of salt was lost by inevitable accident, it was held that the carrier could not collect for the portion delivered.

<sup>4</sup> *Russell Mfg. Co. v. New Haven S. S. Co.*, 52 N. Y. 657; *McKee v. Hecksher*, 10 Daly, 393.

<sup>5</sup> N. Y. Cent. & H. R. Co. v.

*Standard Oil Co.*, 20 Hun (N. Y.), 39; affirmed, 87 N. Y. 486.

<sup>6</sup> Story on Bailm., sec. 303; *Young v. Kimball*, 23 Pa. St. 193; *Van Baalen v. Dean*, 27 Mich. 104.

<sup>7</sup> *Hagerstown Bank v. Express Co.*, 45 Pa. St. 519.

<sup>8</sup> Story on Bailm., sec. 93f; *Merrick v. Brainard*, 38 Barb. 574.

full value of the goods claimed, and to retain in his own right the amount due for his services and hold the balance in trust for the owner.<sup>9</sup> If the goods have been lost and the owner has recovered of the carrier for the value of the goods, the carrier is entitled to the full amount he may recover from the person or persons who deprived him of them, and in such case the carrier becomes the owner and succeeds to all the rights and privileges of the owner. Indeed, he becomes the equitable assignee of the owner of the property.<sup>10</sup>

§ 541. — **The carrier may insure the goods.**—The interest of the carrier is sufficient, and to that extent he may insure the goods not only for the amount of his special property in them, but for the full amount of the property. It has been held that where the carrier has obtained insurance upon the property for the full amount and the property is lost by fire, he may recover the amount of the insurance although he had by contract limited his liability to the extent that he was not to be liable if lost by fire. But in such case the whole amount of insurance over and above the amount due the carrier for compensation inures to the benefit of the owner.<sup>11</sup> But the carrier could not insist upon the owner insuring the goods as a condition precedent to his receiving them for carriage, because that would be antagonistic to the rule that the carrier must receive and carry freight for all who apply, if the freight offered is in the line of his business.<sup>12</sup>

§ 542. — **When can the carrier sell the goods.**—To satisfy his lien the carrier cannot sell the goods except as authorized by law. In most of the states a foreclosure of the lien is provided by statute, and in such case the statute must be followed. There are circumstances, however, when the carrier is not only permitted to sell but it is his duty to sell the goods; not because of an unsatisfied lien for his compensation, but because of his duty to use diligence in promoting the best interests of the owner while the property is under his control, and to this end he is bound

<sup>9</sup> *Ingersoll v. Van Bokkelin*, 7 Cow. 670; *Strong v. Adams*, 30 Vt. 221; *Hutch. on Carriers*, sec. 426.

<sup>10</sup> *Hagerstown Bank v. Express Co.*, 45 Pa. St. 49; *White v. Webb*, 15 Conn. 302; *Hickok v. Buck*, 22 Vt. 149; *Little v. Fosset*, 34 Me. 545.

<sup>11</sup> *Insurance Co. v. Railroad Co.*, 63 Tex. 475; *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606; *Eastern R. Co. v. Relief Ins. Co.*, 98 Mass. 420; *Commonwealth v. Hide & Leather Co.*, 112 Mass. 136, 7 Exch. 323.

<sup>12</sup> *Inman v. South Car. Ry. Co.*, 129 U. S. 128.

to dispose of the goods to the best advantage; as, for example, when the carrier cannot carry the goods to their destination, or obtain them to be carried because of disaster to his ship while at sea, or under circumstances when he is rendered helpless as to the carrying of the property—as where the goods are perishable and will not last to be carried to their destination. In such case the carrier may sell the goods to the very best advantage. It is said, however, that he should sell, if possible, where there will be competition; but if he cannot do so it is his duty to communicate to the owner of the property before he makes such sale.<sup>13</sup> The law demands that there must be the utmost fairness in such cases on the part of the carrier. His conduct will at all times be open to investigation of the owner and by the court; and even if the owner accepts the amount received by the carrier upon such sale of the goods, this will not preclude him from disputing the claim of the carrier where he has not consented to the sale; nor will it preclude him from a further recovery in case of fraud or unfair dealing or negligence on the part of the carrier. The rule is discussed in the case of *The Julia Blake*, above cited. The court say: “The master can neither sell nor hypothecate the cargo, except in case of urgent necessity, and his authority for that purpose is no more than may reasonably be implied from the circumstances in which he is placed. He acts for the owner of the cargo because there is a necessity for some one to do so, and like every agent whose authority arises by implication of law, he can only do what the owner, if present, ought to do. Necessity develops his authority and limits his powers. What he does must be directly or indirectly for the benefit of the cargo, considering the situation in which it has been placed by the accidents of the voyage. As was said by Sir William Scott in *The Gratitude*,<sup>14</sup> by which the power of the master, under proper circumstances, to hypothecate the cargo to pay the expenses of repairs on the ship, was incontrovertibly established: ‘In all cases it is the prospect of the benefit to the proprietor that is at the foundation of the authority of the master. It is therefore

<sup>13</sup> *Hall v. Ocean Ins. Co.*, 37 Fed. 371; *The Julia Blake*, 107 U. S. 418.

<sup>14</sup> 3 C. Rob. 240, 261; *Duncan v. Benson*, 1 Exch. 557; *The Onward*, Law Rep. 4 Ad. & Ec. 38,

57; *Ross v. The Ship Active*, 2 Wash. C. C. 228, 237; *The Packet*, 3 Mason, 255, 259; *New England Ins. Co. v. The Sarah Ann*, 13 Pet. (U. S.) 387, 400; *The Amelia*, 6 Wall. 18, 27.

true that, if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs. But it appears to me that the fallacy of the argument, that the master cannot bind the cargo for the repairs of the ship, lies in supposing that whatever is done for the repairs of the ship is in no degree and under no circumstances done for the benefit, or with the prospect of benefit, to the cargo; whereas the fact is that, though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo.' "

§ 543. **The amount charged.**—The amount of freight the common carrier can charge, in the absence of an express contract fixing the amount, must of course depend upon the circumstances of the particular case; the charge must be a reasonable one, and is a question for the jury; however, this does not mean that it must be the same in amount as is charged to every other customer for the same service; not that charges to all must be equal, but that it must be no more than reasonable; it may be less, but cannot be more. No one can be charged an excessive rate; the highest rate charged must be reasonable. This is the common-law rule regardless of any statutes that have been passed regulating charges.<sup>15</sup>

Where a railroad company compelled the plaintiff to pay for lumber shipped over its road fifty cents per thousand more than it charged another party for transporting lumber over its road at the same time, it was held by the court "that all the entire public have the right to the same carriage for a reasonable price and at a reasonable charge for the service performed; that the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charges." The court further say: "All the shipper can ask of a common carrier is that for the service performed he shall charge no more than a reasonable sum to him; that whether the carrier charges another more or less than the price charged a particular individual may be a matter of evidence in determining whether a charge is too much or too little for the service performed, and that the difference between the charges cannot be the measure of damages in any case unless it is established by proof that the smaller

<sup>15</sup> Louisville, etc. R. Co. v. Wilson, 119 Ind. 352.

charge is the true reasonable charge in view of the transportation furnished, and that the higher charge is excessive to that degree. The obligations in this matter must be reciprocal. Where there is no express contract, the common-law action by the carrier against the shipper is for a *quantum meruit*, and the liability of the shipper is for a reasonable sum in view of the service performed for him. What is charged another person, or the usual charge made against many others, is matter of evidence admissible to ascertain the value of the service performed. In every case the legality of the charge is established and measured by the value of the service performed, and not by what is charged another, unless what is charged the other is the compensating sum, in which event it is the proper sum, not on account of its equality, but because of the relation it bears to the value of the service performed as an adequate compensation therefor. To sum the whole matter up, the common law is that a common carrier shall not charge excessive freights. It protects the individual from extortion and limits the carrier to a reasonable rate, and this is on account of the fact that he exercises a public employment, enjoys exclusive franchises and privileges, derived, in the case of defendant here, by grant from the state. The rule is not that all shall be charged equally, but reasonably, because the law is for the reasonable charge and not the equal charge. A statement of inequality does not make a legal cause of action because it is not necessarily unreasonable. It would be a strange rule indeed which would authorize a shipper, after being compelled to pay his freights according to established rates, to look around and find some smaller charge for the same service during the same time, which may be either as a gratuity or a sale of service at a non-compensating rate, or less than the reasonable charge, and claim his damages according to this difference, based upon an inequality not general in its character, but existing only by virtue of a charge made for the same service against one other person. . . . Whether a charge made by A. against B. is reasonable cannot be determined by establishing the charge against C. for the same service. It is too plain for argument that the higher charge, where there is a difference, may be what is the compensating sum, and the lower charge may be too small for the service.”<sup>16</sup>

<sup>16</sup> Johnston v. Pensacola Ry. Co. 16 Fla. 623, 26 Am. Rep. 731. In this case, which was a case de-

cided squarely upon the common law, the court has cited and quoted from the English cases

§ 544. Right of carrier to collect its advances to connecting carriers.—Custom and general usage, adopted by carriers and generally understood and acquiesced in by the public, have established rules recognized by the courts as the law governing in

and also from the American cases. We have taken from the opinion several citations and quotations. "In *Peck v. North Staffordshire R. Co.*, decided in 10 House of Lords Cases, in 1863, Mr. Justice Blackburn says: 'A common carrier is bound to carry for a reasonable remuneration.' In one of the earlier cases upon the subject it is said that 'where there is no agreement as to price, the carrier might have a *quantum meruit* for his hire.' This means simply that he could recover the value of his service. In *Harris v. Packard*, 3 Taunt. 264, it is said: 'A carrier is bound by law to carry everything which is brought to him for a reasonable sum to be paid to him for the same carriage and not to extort what he will.' We cannot say that the carrier is bound to carry anything beyond articles of such class as he is under a legal obligation to carry, but it is unquestionably true that his charge must be 'reasonable.' In the case of *Citizens' Bank v. Nantucket S. Co.*, 2 Story, 85, Mr. Justice Story, speaking of the hire or recompense of common carriers, remarks that 'it may be in the nature of a *quantum meruit*.' The same view is announced in 5 Wend. 340, and in 5 Wend. 350. Says Parke, B., in *Pickford v. Grand Junction R. Co.*, 8 M. & W. 378: 'The carrier is bound to receive the goods on the money being paid or tendered, and the holder to pay the reasonable amount demanded.' In 2 Steph.

(N. P.) 978, it is said 'common carriers are bound to receive and carry the goods of the subject for a reasonable reward.' In 1 Duval, 146, the court of appeals of Kentucky says: 'A common carrier cannot, like a merchant or mechanic, consult his pleasure or caprice as to the conduct of his business. The law makes it his duty, when he can conveniently do so, to receive and carry goods for any person whatsoever for a reasonable hire.' . . . That principle was followed up in the case of *Bolt v. Stennett*, 8 Term Rep. 606; for there, the quay being one of the public quays licensed under the statute of Elizabeth, it was held that the owner was bound to permit the use of the crane upon it, and could not insist either that the public should not use the crane at all, or should use it only upon his own terms, but that he was bound to permit the use of it upon reasonable terms.' . . . It cannot be questioned that the reason why a common carrier is restricted to reasonable rates is the same that causes the limitation at common law upon the rates to be charged by a wharfinger licensed under a statute. In reference to a railroad company it may be truly said that it exercises a *quasi*-public employment. While railroads are managed for private benefit and the profits resulting from their operation go to individuals, yet they are treated as merely a public convenience and agency in the mat-



such cases: that connecting carriers may advance to the carrier from whom it receives freight and collect of the consignee or shipper the amount, with its own freight charges added, on delivery of the goods to the consignee, provided always that the

ter of state and interstate commercial intercourse. It is the public character attached to them which, under certain circumstances, authorizes taxation for their construction, as a tax for a private purpose is unconstitutional; and it is the like public nature of their functions which enables them to become the objects of a legislative grant to take the property of an individual for their use, paying a reasonable compensation therefor. . . .

In the case of *Fitchburg Ry. Co. v. Gage et al.*, 12 Gray, 393, the supreme court of Massachusetts held 'that a railroad corporation is not obliged as a common carrier to transport goods and merchandise for all persons at the same rates.' In speaking of the common-law rule that court says: 'It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charges in each particular case of service a reasonable compensation and no more. If the carrier confines himself to this, no wrong can be done and no cause afforded for complaint.' The claim made in this case arose out of a difference between the freights upon plaintiff's ice and the price charged others upon the same class of freights. It was not upon the same material, but the court treated the case as involving the same principle. It based its conclusion upon the ground that the

plaintiff did not set out a case of excessive or unreasonable charge. In the last edition of *Story on Bailments* we find the rule of the common law thus stated: "At common law a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable, nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate or even gratis.' In support of this doctrine the following cases are cited: 12 Gray, 393; 2 P. C. 237; 4 C. B. (N. S.) 78; 12 C. B. (N. S.) 74. While the text is the reasonable deduction from remarks in these cases, still, with the exception of the case reported in 12 Gray, they were cases arising under statutes. Most of the cases treat the common-law rule strictly as between the parties, and without comparison as to the charges against others, the cases where legislative action is being construed and is controlling being omitted as not being in point. The cases stating the common-law rule are simply that the charge must be reasonable. Thus far there cannot be any reasonable difference between fair minds. In the next place, the right to have the service of the

charges be reasonable. This privilege seems to be based upon another theory, and it has been held "that a common carrier through whose hands goods are shipped is the agent of the owner, and has implied authority to advance charges on the goods and collect them again from the next carrier to whom they are delivered."<sup>17</sup> And where one purchased property in New York, it being agreed by the seller that it should be delivered in St. Louis for a certain sum of money, and it was sent by the route pointed out by the buyer over several roads forming one line, terminating at St. Louis, the last carrier paying the freight and charges of all preceding carriers, and demanding of the purchaser the amount they had paid with their own freight added, all of which amounted to a much larger sum than that agreed upon by the seller, it was held that the railroad company was entitled to recover the amount demanded.<sup>18</sup> But while the connecting carrier may pay the charges and freight upon the goods received from the preceding carrier, and collect, as we have seen, from the consignee or the owner, he is not obliged to do so; he may receive the goods as the agent of the carrier who delivered the goods to him, and collect the amount for him of the consignee.<sup>19</sup>

common carrier at a reasonable rate is common. Upon a tender of a reasonable compensation, unless there is a reasonable ground for his refusal, in case of refusal he will be liable to an action. Under such circumstances he must receive and carry all goods offered for transportation by any person whatever upon receiving a suitable hire."

<sup>17</sup> *Armstrong v. Chicago, etc. Ry. Co.*, 62 Mo. App. 639.

<sup>18</sup> *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228; *Naugatuck Ry. Co. v. Beardsley Scythe Co.*, 33 Conn. 218. "A connecting carrier has authority to advance charges and freight and collect the same upon delivery of the goods." *Bissell v. Pierce*, 16 Ill. 408. And governs even though goods are damaged. *Ibid.* Where a "car-

rier has advanced the charges of an antecedent carrier who transported the goods under an independent contract, he becomes subrogated to the rights of the latter, and may recover such advances although he fails to perform his own contract; and the fact that his bill of lading is for transportation and delivery upon payment of freights and charges does not deprive him of such right." *Western Transp. Co. v. Hoyt*, 69 N. Y. 230, 25 Am. Rep. 175.

<sup>19</sup> In *Orgeon Short Line, etc. Co. v. Northern Pac. R. Co.*, 51 Fed. 465, it was held: "In the absence of any regulation by law or custom, a railway company receiving freight from a connecting line is not required to advance or assume payment of the charges due thereon for transportation

§ 545. Who is liable to the carrier for the freight.—The consignee is presumed to be the owner of the goods and so may be said to be *prima facie* liable for the freight charges. But this is merely a presumption that may be overcome by proof. If the consignee, however, accepts the goods from the carrier, he becomes liable for the payment of the freight, and the carrier can collect from him the amount together with other charges that follow the goods.<sup>20</sup> Notwithstanding the presumption that the consignee is the owner of the goods, the carrier may hold the shipper for the freight if he chooses to do so, even if the shipper does not own the goods and the carrier has waived his lien. It was the shipper who procured the carrier to do the service, and impliedly he assumed the payment of the freight; and it has been held that he is liable for the freight, and is not the less liable because the consignee is also liable.<sup>21</sup>

§ 546. Where the freight is only carried a part of the distance contracted for—*Pro rata itineris*.—It will be remembered that goods are placed in the custody and control of the carrier only for the purpose of being transported as contracted for at the time. The owner's right to the goods is always paramount to that of the carrier; he may take them from the possession of the carrier at any time, or at any place while in transit before they reach their destination, but in such case if the carrier has commenced the transportation and is ready and able to continue carrying the goods, and to deliver them at their destination, he is entitled to compensation for the full performance of the contract.<sup>22</sup> This is upon the theory that the carrier has a lien upon

from the point of origin to the point of connection." *Baltimore & Ohio Ry. Co. v. Express Co.*, 22 Fed. 32. In *Travis v. Thompson*, 37 Barb. 236, it was held: A carrier taking goods from a previous carrier is not obliged to pay his predecessor's charges, but may be regarded as the agent of his predecessor to collect his lawful charges.

<sup>20</sup> *Northern German Lloyd v. Heyle*, 44 Fed. 100; *Gates v. Ryan*, 37 Fed. 154.

<sup>21</sup> *Wooster v. Tarr*, 90 Mass. (8 Allen), 270, 85 Am. Dec. 162; *Hay-*

*ward v. Middleton*, 3 McCord (S. C.), 121; *Gilson v. Madden*, 1 Lans. (N. Y.) 172; *Grant v. Wood*, 21 N. J. L. 292, 47 Am. Dec. 162; *Blanchard v. Page*, 74 Mass. (8 Gray), 281; *Great Western Transp. Co. v. Bagg*, 15 Q. B. Div. 626; *Story on Bailm.* 589; *Holt v. Westcott*, 43 Me. 445; *Minor v. Norwich, etc. Ry. Co.*, 32 Conn. 91; *Thomas v. Snyder*, 39 Pa. St. 317; *Hutch. on Carriers*, 451.

<sup>22</sup> *The Gazelle*, 128 U. S. 474; *Braithwaite v. Powers*, 1 N. Dak. 455, 48 N. W. 354.

the goods for the performance of the contract for transportation and so has the right to possession of them for a reasonable time and until the contract is performed. The owner may waive his contract for further transportation, but in order to discharge the lien and deprive the carrier of the right of possession by reason of his services and contract for further services the shipper must pay the freight as stipulated.

On the other hand, the carrier may find it impossible to carry the freight to its destination because of some disaster. If the goods are destroyed by the act of God or the public enemy while being transported or before delivery, the carrier is not entitled to payment of the freight. But where goods are not destroyed and the carrier is unable to proceed he may reship by some other carrier. If, in such case, the original carrier is compelled to pay a larger amount for the continued transportation than the original contract stipulated for the entire shipment, the shipper or owner would be liable for the amount that is contracted to be paid, for it would be held that the original carrier was the agent of the shipper with authority to make the contract, and the owner or consignee would be compelled to answer to this contract; but he would, no doubt, have redress from the original carrier for the difference. In such case the original carrier would not be entitled to compensation for carrying the goods to the place of disaster. But on the other hand, if the amount contracted to be paid the carrier, who received the freight by contract from the original carrier at the place of disaster, was a less amount than that to be paid to the former carrier, in such case the owner, or consignee, or shipper would be liable to pay the difference to the original carrier. But suppose it to be a case where the owner or consignee desired to take possession of his goods at the place of disaster, believing, for example, that he could ship them to their destination to a better advantage, or that he could sell them in the market at that place to as good an advantage as at the destination, or for any other reason should desire to relieve the carrier; in such case the carrier would be entitled to a *pro rata* compensation, that is, to such a part of the compensation as had been fairly earned. This is usually termed *pro rata itineris*.

§ 547. Where goods shipped against the will of the owner, as by one not having the right to ship.—The owner of the goods cannot wrongfully be deprived of them or of their possession;

and so if goods are stolen or have been shipped by one who had no authority to ship them, in such case the owner could recover his goods from the carrier, and the carrier would not be entitled to compensation for their shipment, and should the carrier refuse upon demand to deliver the property to the true owner he would be liable in an action for conversion.<sup>23</sup>

#### AS TO DISCRIMINATION.

**§ 548. Law forbidding, applies to all branches of carrier's business.**—The law forbidding discrimination applies to all branches of the carrier's business; this is now generally regulated by statutes throughout all the states and in the United States. The act of congress regulating this is known as the Interstate Commerce Act. The statutes of the states, as a general rule, but re-enact the established rules of the common law upon the subject.

Great stress is laid upon the fact that common carriers are to a great extent servants of the public; their franchises are granted by the people, and it is expected in return that there will be no favors shown to any class or any branch of trade. As has been said, "railroads are public instrumentalities, and the public is concerned in the manner in which their affairs are managed, as well as the service they render. As common carriers they are expected to supply suitable and adequate accommodations for the business on their lines, and to so perform their service as not to afford preference to some nor cause prejudice to others. They are expected to do their business through their own corporate agencies, and not to delegate their duties to independent and often irresponsible parties acting as middle-men between the carriers and the public. For continuous carriage by connecting routes all reasonable facilities are expected to be afforded. In short, railroads, as the necessary highways of the country, are expected to keep in view the purpose for which their franchises were granted, and, while guarding their revenues with fidelity to their corporate interests to

<sup>23</sup> A carrier acquires no right by virtue of its employment as such to hold goods delivered to it by a wrong doer to whom they do not belong, until the charges are

paid against the claim of the true owner. *Savannah, etc. R. Co. v. Talbert*, 123 Ga. 378, 51 S. E. 401. See *post*, § 555 and notes.

make the public service their constant aim, and to so manage their affairs that the service shall be impartial and reasonable." <sup>24</sup>

The definition of a common carrier usually concurred in expresses the legal duty of the carrier in this respect: "One who holds himself out as ready and willing to carry the goods of all who may apply," etc. It implies that all will be treated alike, and that there shall be no discrimination.

§ 549. — **Relates to facilities for shipment.**—The requirements of the law have reference to all the facilities incumbent upon the carrier to furnish—its station facilities, dock privileges, the use of warehouses for the delivery and receipt of the goods, the use of stock pens for the shipment of animals, the furnishing of cars or boats for the transportation of the goods, and the motive power for drawing the trains as well as rates for carriage. As the carrier is bound to furnish all these facilities, he is legally bound to furnish them without unjust and undue discrimination.

"At common law," says an eminent jurist, "common carriers were held to be persons who exercised their calling for the public good upon equal terms and with the same facilities to all their customers. They could not lawfully exercise their calling by granting advantages to one customer which they denied to another, but were held to the duty of serving all alike. Their calling is one public in its nature, and the common law exacted of them a strict impartiality in their dealings with the public." <sup>25</sup>

§ 550. **The discrimination that is forbidden.**—As has been said, discrimination does not mean merely unequal rate charges; the carrier may charge one customer a less rate than is determined to be a reasonable rate, and which is charged to another customer. <sup>26</sup> The vice that is aimed at is a partiality that will affect trade and create and nourish monopolies. As, for example,

<sup>24</sup> Int. St. Comm. Commission Rep. 399.

<sup>25</sup> Fitzgerald v. Grand Trunk Ry. Co., 63 Vt. 169, 13 L. R. A. 70; Messenger v. Pa. Ry. Co., 36 N. J. L. 407; Audenreid v. Philadelphia Ry. Co., 68 Pa. St. 370; McDuffie v. Railway Co., 52 N. H.

430; New England v. Railway Co., 57 Me. 188.

<sup>26</sup> Schofield v. Railway Co., 43 Ohio St. 571; Cleveland, etc. Ry. Co. v. Clossar, 126 Ind. 348, 25 N. E. 159 and cases cited in the opinion. Central Ga. R. Co. v. Augusta, etc. Co., 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119.

where competition is sharp among dealers in a certain commodity a partiality as to furnishing facilities for shipment or rates extended to a certain dealer or company might be sufficient to create a monopoly for the favored dealer and drive all others from the trade. It is this unjust or oppressive partiality that favors one at the expense of others that the law forbids. As said by Judge Elliott: "It is safe to say that the rule is that a railroad carrier, so far as concerns the receipt and transportation of goods, however it may be as to rates of freight, must, where the conditions and circumstances are identical, treat all shippers alike. It cannot furnish facilities to some shippers and deny them to others unless there is a difference in condition or circumstances such as makes the discrimination a just one."<sup>27</sup>

In a case in Pennsylvania<sup>28</sup> involving the question of violation of the statute and constitution of the state, which is but a re-enactment of the common-law rule, the court say: "It (the law) prohibits only discrimination which is undue or unreasonable, and the prohibited discrimination is further limited by the consideration that it must be 'for a like service from the same place upon like conditions and under similar circumstances.'"<sup>29</sup> It has been said that "a railroad company is an improved highway and the public are equally entitled to its use; it must provide equal accommodations for all upon the same terms."<sup>30</sup>

And in *Louisville, etc. Ry. Co. v. Wilson*,<sup>31</sup> it is said by the supreme court of Indiana: "Railroad companies are granted charters and are given the right of eminent domain because when the roads are constructed, though owned by the corporation, they are nevertheless for public use, and are, in a qualified sense, public highways. Everyone constituting a part of the public for whose use they are constructed is entitled to an equal and impartial participation in the use of the facilities for transportation which they afford. While power to fix rates is conferred upon them by law, such rates are always open to investigation by the courts; for it is an elementary rule that common

<sup>27</sup> Elliott on Railroads, 1468;  
Little Rock, etc. R. Co. v. Oppen-  
heimer, etc. Co., 64 Ark. 271, 44  
L. R. A. 353.

<sup>28</sup> State v. Cincinnati, N. O. etc.  
Ry. Co., 47 Ohio St. 130, 7 L. R.  
A. 319.

<sup>29</sup> Hoover et al. v. Pa. Ry. Co.,  
156 Pa. St. 220, 22 L. R. A. 263.

<sup>30</sup> Louisville, etc. Ry. Co. v. Wil-  
son, 132 Ind. 517, 18 L. R. A. 105.

carriers can charge no more than a reasonable compensation for the services performed. While it is true that there is apparently some conflict in the authorities, the principles here announced we think are supported by the weight of authority."<sup>21</sup>

A writer on railway law thus expresses the general rule: "Railways are held to the strictest impartiality in the conduct of their business, in withholding all privileges or preferences from one customer which are not extended to all others."<sup>22</sup>

"The hinge of the question," says a learned judge, "is not found in the single fact of discrimination, for discrimination without partiality is inoffensive, and partiality exists only in cases where advantages are equal, and one party is unduly favored at the expense of another who stands upon an equal footing."<sup>23</sup>

§ 551. — Regulation by statutes of states.—The states generally have enacted statutes regulating this subject and imposing upon the railroad companies restrictions in the operation

<sup>21</sup> Root v. Long Island R. Co., 114 N. Y. 300, 4 L. R. A. 331; New Eng. Exp. Co. v. Maine Cent. R. Co., 57 Me. 188; Scofield v. Lake Shore & M. S. R. Co., 43 Ohio St. 617, 54 Am. Rep. 846; Sandford v. Catawissa, W. & E. R. Co., 24 Pa. St. 378, 64 Am. Dec. 676; Hays v. Pennsylvania Co., 12 Fed. 309; Attorney-General v. Chicago & N. W. R. Co., 35 Wis. 426; Samuels v. Louisville & N. R. Co., 31 Fed. 57; Providence Coal Co. v. Providence & W. R. Co., 1 Inter. Com. Rep. 363.

<sup>22</sup> 1 Wood, Railway Laws, 565.

<sup>23</sup> Cleveland, C. & I. Ry. Co. v. Closser, 126 Ind. 348, 9 L. R. A. 754, the court in the above case citing English cases said to support this general doctrine; Garton v. Bristol & E. R. Co., 1 Best & S. 112; Hozier v. Caledonian R. Co., 1 N. & McN. 29; Great Western R. Co. v. Sutton, L. R. 4 H. L. 238; Ransome v. Eastern Counties R. Co., 1 N. & McN. 45; Oxlade v. Northeastern R. Co., id. 72, 1 C.

B. (N. S.) 454; Bellsdyke v. North British R. Co., 2 N. & McN. 105. The American cases seem to flow in the same general channel. Bayles v. Kansas Pac. R. Co., 13 Colo. 181, 5 L. R. A. 480; Spofford v. Boston & M. R. Co., 128 Mass. 326; Fitchburg R. Co. v. Gage, 12 Gray, 393; Johnson v. Pensacola, etc. R. Co., 16 Fla. 632; Ragan v. Aiken, 9 Lea, 609, 42 Am. Rep. 684; McDuffie v. Portland & R. Co., 52 N. H. 430, 13 Am. Rep. 72; Hersh v. Northern Cent. R. Co., 74 Pa. St. 181; Christie v. Missouri Pac. R. Co., 94 Mo. 453, 7 S. W. 567; Chicago & A. R. Co. v. People, 67 Ill. 1; Erie & Pac. Desp. v. Cecil, 112 Ill. 185; Root v. Long Island R. Co., 114 N. Y. 300, 4 L. R. A. 331; Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505; Union Pac. R. Co. v. United States, 117 U. S. 355; Interstate Commerce Com. v. Baltimore & O. R. Co., 8 R. R. & Corp. L. J. 343, 3 Inter. Com. Rep. 192.



of the several roads within the state, touching the furnishing of cars, freight charges, passenger traffic, running of trains, taxation and numerous matters in relation to the conducting of the business of the carrier, but these statutes are only local and have no binding force beyond the boundaries of the state. They are intrastate laws and regulations and not interstate. And while the Federal courts have steadily upheld the power of the several states to enact these laws, and have generally sustained them; they have as generally held to the strict and plain distinction in the powers delegated to the general government in the constitution of the United States and those reserved to the states.

It will be interesting to notice some of these cases as illustrating not only the power of the states to regulate intrastate commerce, but the necessity of the general government to regulate interstate commerce.

In an early case Chief Justice Marshall very clearly construed the powers delegated to the general government as stated in section 3, art. VIII of the constitution of the United States.<sup>34</sup> In *Gibbons v. Ogden*,<sup>35</sup> in delivering the opinion of the court he said: "It is not intended to say that those words comprehended that commerce, which is completely internal which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. . . . Comprehensive as the word 'among' is it may very properly be restricted to that commerce which concerns more states than one. . . . The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The complete internal commerce of a state, then, may be considered as reserved for the state itself." This case has been generally followed. In *Wabash Ry. Co. v. Illinois*<sup>36</sup> the question was again before the court and it was said

<sup>34</sup> Sec. 3, Act VIII, U. S. Const.:  
"Congress shall have power to  
regulate commerce with foreign

nations and among the several  
States and with the Indian tribes."

<sup>35</sup> 9 Wheat. 1, 194.

<sup>36</sup> 118 U. S. 564.

by the court: "It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the state which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, when the lines of those classes approach each other, to distinguish between the one and the other." And the courts have gone further and held that where a railroad company is doing an interstate business, and at the same time an intrastate business, as to the latter it will be entirely governed by the laws of the state and the general government cannot interfere. The question has arisen where the state has imposed a license for carrying goods from place to place in the state;<sup>37</sup> in upholding a statute imposing a tax on each sleeping and palace car company carrying passengers from place to place within the state,<sup>38</sup> in holding valid statutes fixing rates for intrastate commerce,<sup>39</sup> in cases involving statutes requiring the company to stop its trains at certain stations,<sup>40</sup> and in a long line of cases involving statutes in several of the states requiring carriers to provide separate accommodations for the white and colored races.<sup>41</sup>

But while these state statutes were fully recognized by the courts as of binding effect within the state enacting them they were of no force as regulating commerce among the states. The remedies they gave for the regulation of intrastate commerce were not sufficient to regulate interstate business and the result was that out of the intent to regulate often came confusion; for with the establishing and operating of great trunk

<sup>37</sup> *Osborn v. Florida*, 164 U. S. 650.

<sup>38</sup> *Pullman Co. v. Adams*, 189 U. S. 420; *Penn. R. R. Co. v. Knight*, 192 U. S. 21.

<sup>39</sup> *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503; *L. & N. R. Co. v. Eubank*, 184 U. S. 27; *C. B. & S. v. Iowa*, 94 U. S. 155.

<sup>40</sup> *Gladson v. Minnesota*, 166 U. S. 430; *L. & N. R. Co. v. Kentucky*, 161 U. S. 667; *Ill. Cent. R.*

*Co. v. Illinois*, 163 U. S. 142; *C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514.

<sup>41</sup> One of the earlier cases involving the right of a state to require separate coach laws was *Hall v. McCain*, 95 U. S. 485. This case has been followed by *Louisville R. Co. v. Mississippi*, 133 U. S. 587; *Plossy v. Ferguson*, 163 U. S. 537; *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388.

lines reaching across many states, all under one management came a disregard of obligations, that justly rested upon the carriers, because there was no general law of congress defining the duties of common carriers in interstate commerce business and no court to which one could appeal when an injustice had been suffered.

So great was the need of correcting the evils in both freight and passenger traffic that the congress of the United States acting under its constitutional authority "to regulate commerce with foreign nations and among the several states, and with the Indian tribes;" passed "an act to regulate commerce" which was approved February 4th, 1887, and is commonly known as the interstate commerce act.

§ 552. **The interstate commerce act.**—This act was aimed at the regulation of freight and passenger rates on interstate lines, and the general business of the carrier so far as regulating discriminating charges, rebates and the unjust favoring of certain customers or corporations, and the overcharging of others.

The general oversight and enforcing of the law was placed under the supervision of a commission, who were given certain powers and jurisdiction to act. This law after being in operation for twenty years was found inadequate and was amended by an act enlarging the powers of the interstate commerce commission approved June 29, 1906.<sup>42</sup>

<sup>42</sup> Part 1, Statutes of the United States, first session 59th Congress, page 584, etc. By the first section of the act as amended it is provided that the act shall apply "to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or prop-

erty wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment) from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States or the District of Columbia or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in

## THE LIEN OF THE CARRIER.

§ 553. **Similar to the lien of the bailee—Special, not general.**—Generally the same principles that have already been discussed as applying to the lien of bailees apply to the lien of the carrier. The common carrier has a specific lien upon

like manner of property shipped from any place in United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country; Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to receiving, delivering, storage, or handling of property wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid."

"The term common carrier as used in this act shall include express companies and sleeping car companies. The term railroad as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned and operated under a contract agreement or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term transportation shall include cars

and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipts, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

"All charges made for any services rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

The act then prohibits common carriers subject to the provisions of the act, from issuing free passes or free transportation except in certain cases specified, and fixes the penalty for doing so; from transporting except of certain kinds, products in which the railroad is interested; provides that any common carrier upon application of certain lateral or branch lines or shippers, shall construct, maintain and operate upon reasonable

the goods transported as security for his compensation and charges.<sup>48</sup> The specific lien is implied, but a general lien can only exist by special contract, and such special contract will be

terms switch connections with such lateral lines or branch lines of railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper, providing for proceedings for failure to perform this duty.

Provides that the common carrier shall print and keep open to the public inspection schedules showing all the rates of fares, and charges for transportation between different points on its own route and between different points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water where a through route and joint rate have been established. And if no such rate has been established that the several carriers in such through rate shall keep open for public inspection such schedules showing the separately established rates, those schedules to show also all terminal charges, icing charges and all other charges in connecting with such transportation; which schedules shall be posted in two public and conspicuous places in every depot, station or office of such carriers.

The act also provides that there shall be no changes made in the rates except after thirty days' notice to the commissioner and to the public published as provided.

There are other important pro-

visions regulating the duties of the common carrier and fixing penalties for their violations.

The whole matter of the regulation of freight and passenger carriers is placed in the hands of the commission provided for by the act, known as the Interstate Commerce Commission, this commission is given authority to investigate all complaints that may be made whenever such act is violated, to have general supervision of carriers and to report upon the same; and the report of the commission found and published shall be *prima facie* proof of the facts it contains and conclusion arrived at, and will be so taken in any court of the United States in proceedings with reference to said complaint.

It also provides that when the carrier against whom the commission has found in its report, fails to obey the judgment pronounced, the commission or any person interested may proceed in any of the circuit courts of the United States by a summary proceeding provided for in the act to compel compliance with the finding of the commission. This act should be read in connection with the act of 1887 and the Elkins' act approved Feb. 19, 1903.

<sup>48</sup> Gracie v. Palmer, 8 Wheat. (U. S.) 635; Dyer v. Grand Trunk Ry. Co., 42 Vt. 441, 1 Am. Rep. 350; Barker v. Havens, 17 Johns. (N. Y.) 236, 8 Am. Rep. 393; Hall v. Diamond, 63 N. H. 465; Coal, etc. Co. v. Chicago etc. Co., 116 Mo. App. 214.

strictly construed.<sup>44</sup> The lien gives the carrier the right to retain the possession of the goods until the charges are paid, and so long as the possession is retained by the carrier by reason of the lien, the consignee, or owner, cannot deprive him of it. Statutes in the different states have provided for a foreclosure and a sale to satisfy the lien. The carrier is not authorized by the common law to sell the property either at public or private sale to satisfy the lien; he can only retain the same in his possession until the amount is paid. Nor do the statutes passed by the several states authorize foreclosure except by public sale, which must be not only public but entirely fair and open, after proper notice and at a proper place.

§ 554. **When does the lien attach?**—While there seems not to be entire harmony among the authorities as to this subject, nevertheless as to the principles involved there can be but little if any dispute. The goods are in transit from the time they are received by the carrier for immediate shipment; from that moment the extraordinary liability of the common carrier commences, and the reason for giving to the common carrier the benefit of a lien to secure the payment for his services is, among other things, because he has incurred the common carrier's liability—has become an insurer of the property to be transported. So the lien given the carrier as a reward for the extraordinary liability should be contemporaneous with the attaching of the responsibility. The amount due the carrier may be large or small, depending upon the amount of service performed, but the lien will attach at the same time the goods are accepted for immediate shipment. Lord Campbell, in *Taylor v. Tindall*,<sup>45</sup> expresses the opinion contended for in the following language: "It is argued that there can be no lien on the goods for freight not yet earned or due; but when the goods were laden to be carried on a particular voyage there was a contract that the master

<sup>44</sup> *Pennsylvania R. Co. v. Oil Works*, 126 Pa. St. 485; *Bacharach v. Chester Freight Line*, 33 Pa. St. 414.

<sup>45</sup> 4 El. & Bl. 219. In *Bartlett v. Carnley*, 6 Duer (N. Y. Super. Ct.), 194, it was held "that the freighter who removes goods once shipped with a bill of lading delivered can only reclaim them

upon payment of freight, necessary expenses of unloading, and indemnifying the party for any differences between the value of the goods at the port of lading and what the master or ship-owner may be obliged to pay at the port of destination under such bill of lading."

should carry them in the ship upon that voyage for freight; and the general rule is that a contract once made cannot be dissolved except with the consent of both the contracting parties. By the usage of trade, the merchant, if he redemands the goods in a reasonable time before the ship sails, is entitled to have them delivered back to him on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them; but these are conditions to be performed before the original contract can be affected by the demand of the goods. It would be most unjust to the owners and master of the ship if we were to hold that upon a simple demand at any time the goods must be delivered back in the port outfit."

Some of the cases have held that the lien attaches as soon as the goods are placed on board the ship; others that it does not attach until the voyage is commenced. But these opinions were rested upon the ground that no part is due before the commencement of the voyage. And so in the earlier days, when the carrier did not hold out to the public that he would receive and care for the freight before the hour for loading, the rule might have been different; but the same principle ever existed that when the freight is received, and is in the control of the carrier for immediate shipment, the liability attaches and the lien exists. Whether it is received by the carrier in his warehouse for the purpose of immediate shipment, or whether it is received on board his ship, it can make no difference. It must be clear that as soon as the liability attaches to the carrier, his lien attaches to the goods.<sup>46</sup>

§ 555. When shipment made by one without authority.—The carrier must obtain possession of the goods from the owner, or by his consent, either express or implied, and if the possession is not thus obtained, but is wrongful or tortious, even though innocent on the part of the carrier and without fault or negligence of the owner, the carrier will not have the right to compensation for the carrying of the goods, and therefore cannot have a lien upon them for such compensation.<sup>47</sup> "There is

<sup>46</sup> Bailey v. Damon, 3 Gray (Mass.), 92.

<sup>47</sup> In Fitch & Gilbert v. Newberry & Goodell, 1 Doug. (Mich.) 1, the court say: "On the part of

the defendants it is contended that a common carrier who receives goods for carriage and transports them may detain them by virtue of his lien, for freight, even

no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently. If the owner

against the owner, in case the freight has been earned without fraud or collusion on his part; that, if goods be stolen or otherwise tortiously obtained from the legal owner, at New York or elsewhere, and carried by a transportation line from thence to Detroit, without a knowledge of the theft on the part of the carrier, he would be entitled to a lien for freight, even against the owner. This doctrine is sought to be maintained by the defendants' counsel on several grounds: 1. He insists that a common carrier is bound to receive goods which are offered for transportation, and to carry them; that it is not a matter of choice whether he will receive and carry them or not; that he is liable to prosecution if he refuses. 2. That a common carrier is not only bound to receive and transport goods that are offered, but he is liable for their loss, in all cases, except by the act of God and public enemies and the same rule, he insists, applies to warehousemen and forwarders. 3. That the duties and obligations of common carriers and innkeepers are, in all respects, analogous; and an innkeeper is bound to receive and entertain guests, and to account for a loss of their baggage while under his care. 4. That a common carrier, being bound by law to accept goods offered him for carrying, and being responsible for their safe delivery in all cases except when prevented by the act of God or public enemies,

is entitled to a lien for their freight, against all persons, including even the owner, when the goods were tortiously obtained from him; that he is not bound to inquire into the title of the person who delivers them; and such lien exists, although there be a special agreement for the price of carriage. 5. That the master is not bound (nor his agent for him) to deliver any part of a cargo until the freight and other charges are paid. But for the plaintiffs it is contended: 1. That liens are only known or admitted in cases where the relation of debtor and creditor exists, so that a suit at law may be maintained for the debt which gives rise to the lien; that a lien is a mere right to detain goods until some charge against the owner be satisfied. 2. That the defendants obtained possession of the goods without authority from the owners, either express or implied: that no legal privity exists between the parties, and therefore the relation of debtor and creditor does not exist between the defendants or their principals and the plaintiffs, and no action could be maintained by either against them for the freight, or any part of it. . . . That common carriers are bound to receive goods which are offered, by the owners or their agents for transportation and to carry them for a just compensation, upon the routes which they navigate, or over which they convey goods in the prosecution



loses his property or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its

of their business, is too well settled to require discussion, although the general proposition is subject to some qualifications.

. . . That common carriers are responsible for the safe conveyance and delivery of the goods committed to them for carriage is just as conclusively settled as that they are bound to receive and carry them. A common carrier is said to be in the nature of an insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the accepted cases of the act of God, or inevitable accident without the intervention of man, and public enemies. . . . If, as contended for by the defendants, a carrier is bound to receive and carry all goods offered for transportation, without the right of inquiring into the title or authority of the person offering them, then clearly he should be entitled to a lien, even against the owner, upon the goods, until he is paid for the labor he may bestow in their carriage.

"Let us now inquire whether such is the law. The doctrine is certainly opposed to all the analogies of the law, and it seems to me to every principle of common justice. The only adjudged case I have been able to find which favors it is *Yorke v. Gre-naugh*, 2 Ld. Raymond, 866. That was replevin for a gelding. The defendant, who was an innkeeper, received the horse from a stranger, who had stolen him. On demand being made for the horse by the owner, the defendant, who was

ignorant of the theft when he received him, refused to deliver him up until paid for his keeping, insisting on his right of lien. The court held it reasonable that he should have a remedy for payment, which was by retainer; and that he was not obliged to consider who was the owner of the horse, but whether he who brought him was his guest. And Holt, C. J., cited the case of the *Exeter* carrier, which he thus stated: Where A. stole goods and delivered them to the *Exeter* carrier to be carried to *Exeter*, the owner finding the goods in the possession of the carrier demanded them of him. The carrier refused to deliver them without being first paid for the carriage. The owner brought trover for his goods, and it was adjudged that the defendant might detain them for the carriage, on the ground that the carrier was obliged to receive and carry them. Powell, J., denied the authority of the *Exeter* case, but concurred with Chief Justice Holt in the decision of the case then under consideration. There is an obvious ground of distinction between the cases of carrying goods by a common carrier and the furnishing keeping for a horse by an innkeeper. In the latter case it is equally for the benefit of the owner to have his horse fed by the innkeeper in whose custody he is placed, whether left by a thief or by himself or agent; in either case food is necessary for the preservation of his horse, and the innkeeper confers a benefit upon the owner by feeding him.

use by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done

But can it be said that a carrier confers a benefit on the owner of goods by carrying them to a place where, perhaps, he never designed and does not wish them to go? . . . The obligation of a common carrier to receive and carry all goods offered is qualified by several conditions, which he has a right to insist upon before receiving them: 1. That the person offering the goods has authority to do so. 2. That a just compensation, or the usual price, be tendered for the carriage. And 3. That, although the owner or his agent offers goods for carriage and tenders payment for the freight in advance, still he is not bound to receive them unless he have the requisite convenience to carry them. In an action brought against a carrier for refusing to receive and carry goods, would it not constitute a valid defense that the plaintiff had stolen them, although at the time of offering the carrier may not have known they had been stolen? In *Story on Bailm.*, sec. 582, it is laid down that a carrier is excused for non-delivery of goods to the consignee, when they are demanded or taken from his possession by some person having a superior title to the property. And again, where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded and he resists it, he is liable to an action for the recovery of the goods. If, then, the owner could reclaim the goods in the hands of the carrier, after

their delivery to him, and that would excuse a non-delivery to the depositor, it is clear that he would be justified in refusing to receive them from one having a wrongful possession, although at the time of such refusal he might not know the manner in which they had been obtained. So a carrier is in all cases entitled to demand the price of carriage before he receives the goods, and, if not paid, he may refuse to take charge of them. *Story on Bailm.*, sec. 586; 5 *Barn. & Ald.* 353; 4 *id.* 32; 3 *Bos. & Pull.* 48; and *Whit. on Liens*, 92. If, then, a common carrier may demand payment for carriage in advance, and if he may reject goods offered by a wrong-doer, or by one having no authority to do so, is he not bound to take care that the person from whom he receives them has authority to place them in his custody?

"In *Story on Bailm.*, sec. 585, it is said: A carrier having once acquired the lawful possession of goods for the purpose of carriage is not bound to restore them to the owner again unless his due remuneration be paid; evidently presupposing the goods to have been delivered to him by the owner; and cites 9 *Johns.* 17; 3 *Johns. Cases*, 9. In *Lemprier v. Pasley*, 2 *T. R.* 485, it was held that goods wrongfully delivered to the person claiming them, who paid freight and other charges, could not be detained for those expenses against the rightful owner. In 2 *Kent's Com.* 638, it is laid down that possession is necessary to create the lien, but though there

upon it, the owner can follow and reclaim it in the possession of any person, however innocent," was the language of Fletcher,

be possession of goods, a lien cannot be acquired when the party came to that possession wrongfully. So, if the party came to the possession of goods without due authority he cannot set up a lien against the owner. 2 Kent's Com. 638; 5 T. R. 604; 4 Esp. R. 174; 7 East, 5. In *Buskirk v. Purington*, 2 Hall R. 561, property was sold upon a condition; the buyer failed to comply with the condition, but shipped the goods on board the vessel of the defendants. The owner claimed the goods, demanded them, and, on defendant's refusal to deliver them, brought trover for their value. The defendants insisted on their right of lien for the freight, but the plaintiff was allowed to recover. In *Saltus v. Everett*, 20 Wend. 275, the master of a vessel, with whom the defendant in error shipped goods from New Orleans to New York, during the voyage made a new bill of lading in his own name as owner. The goods at New York were sold to the plaintiff in error, who was ignorant of the shipmaster's fraud. The owner (the defendant in error) sued the purchaser for their value, or return. Senator Verplanck, in the opinion which he delivered in the court of errors, held this doctrine: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser, under a defective title, cannot hold against the true proprietor." And again, "there is no

case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently.' Id. 281. 'If the owner lose his property, or is robbed of it, or it is sold, or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise; or by a qualified possession of it, for a specific purpose, as for transportation or for work to be performed upon it, the owner can follow and reclaim it in the hands of any person, however innocent.' Id. 282. . . .

"Finally, on a full and careful consideration of this case, we arrive at the following conclusions: 1. That a common carrier is bound to receive and carry goods, only, when offered for carriage by their owner or his authorized agent, and then only upon payment for the carriage in advance, if required. 2. If a common carrier obtains the possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value. 3. To justify a lien upon goods for freight, the relation of debtor and creditor must exist between the owner and the carrier, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien." See *ante*, § 547 and note.

J., in *Robinson v. Baker*.<sup>48</sup> The rule, however, would be different where the consignor of the property had apparent authority from the owner to ship the goods, for in such case the carrier would have the right to look to the owner for his charges for carriage; the relation of debtor and creditor would be created, and the carrier would have a lien on the goods for its charges. The same principles would apply as in cases of agency.<sup>49</sup>

§ 556. *For what charges will the lien attach.*—In the absence of an express contract the lien of the carrier will attach to secure the payment of all the reasonable charges for the transportation of the particular goods shipped from the point of shipment to the place of delivery. This would include not only the freight charges over the initial carrier's line, but, in case of through shipment over the several different lines, the charges advanced by each connecting carrier to the carrier from whom it received the freight, together with the charges over its own line or lines, so that the last carrier would be entitled to a lien upon the goods shipped for the freight charged for the shipment over its own line, together with the advances made for freight and charges over the lines from which he received the goods; and the same rule would apply to the carriage of freight by water. If the way-bill, however, which accompanied the freight shows that certain of the charges have been paid, the connecting carrier is held to a knowledge of that fact and cannot have payment of the same charges, by him advanced, protected by a lien. But where there is no joint tariff arrangement—no freight rate agreed upon between connecting carriers, and the initial carrier guarantees a certain through rate which is less than the amount charged by connecting carriers and the last carrier who receives the freight advances the charges to the carrier from whom he receives it, which amount added to his own freight charges makes an amount exceeding that agreed upon by the initial carrier, in such case the last carrier will have a lien for the full amount of charges advanced and his own freight added, notwithstanding the agreement made by the initial carrier; and if the initial carrier had col-

<sup>48</sup> 5 Cush. (Mass.) 141, 51 Am. Dec. 54, citing *Saltus v. Everett*, 20 Wend. (N. Y.) 275, and discussing *Yorke v. Grenaugh*, 2 Ld. Raym. 867.

<sup>49</sup> *York Co. v. Ill. Cent. Ry. Co.*, 3 Wall. (U. S.) 107; *Hutch. on Carriers* (2d ed.) §§ 490, 491.

lected the stated through rate, and it was not enough to cover the charges of connecting carriers, the connecting carriers could charge the difference and enforce a lien against the property to secure their reasonable charges, even though, as stated, it should exceed the amount guaranteed by the initial carrier. This is upon the theory that the initial carrier is the agent of the owner, or shipper of the goods, and not of the connecting carrier.<sup>50</sup> In such case, however, the owner, being compelled to pay the difference between the guaranteed amount and the amount charged, would have an action, and may recover that difference from the initial carrier.<sup>51</sup> But if there has been a previous agreement by the several connecting carriers by which through shipments and through rates were established, and the goods were shipped and the rate guaranteed according to such agreement, in such case the final carrier would not be entitled to compensation in any greater amount than agreed upon by the initial carrier, because by reason of such agreement the initial carrier would be said to be acting as the agent of the connecting carrier rather than as agent of the shipper.<sup>52</sup>

**§ 557. The contract for shipment must be fulfilled.**—The law will demand that the carrier keep his agreement as to the shipment of goods. He cannot deliver the goods at a different dock, or to another carrier than the one stipulated, if the de-

<sup>50</sup> *Schneider v. Evans*, 25 Wis. 241; *Crossan v. New York, etc. Ry. Co.*, 149 Mass. 196. *Goodin v. Southern Ry. Co.*, 125 Ga. 630; and see note to this case in 5 Am. and Eng. Ann. cases, 576-578, where numerous cases are collected upon the subject and the rule stated to be universal that under such circumstances the connecting carrier has a lien for his charges.

<sup>51</sup> In *Detroit, etc. Ry. Co. v. McKenzie*, 43 Mich. 609, it was held that: A contract by a railroad company to transport, for an agreed sum, paid in advance, chattels over its line to a point on the line of another railroad company with which it has no tariff agreement, does not bind

the latter company where it has no notice of the terms of such agreement, and it has a lien on such chattels for its own freight charges, and for freight charges advanced by it to a railroad company which transported the chattels from the line of the receiving company to its own. *Moses v. Port Townsend S. Ry. Co.*, 5 Wash. St. 595, 32 Pac. 488. And in the same case it was held "that though a way-bill showing prepayment of the freight would presumptively afford information to each connecting carrier of that fact, such presumption is not conclusive."

<sup>52</sup> *Evansville, etc. Ry. Co. v. Marsh*, 57 Ind. 507.

livery results in the loss of the goods, without becoming liable; nor can he demand a larger amount than that stipulated for. In one case "the master of a vessel agreed to deliver a boiler and other property at a specified dock in the city of Alpena, for one hundred dollars. On arriving at the dock he demanded one hundred and fifty dollars, and nine dollars dockage, and refused to deliver the property until payment of said sums. The owners of the property offered to pay the one hundred dollars and the dockage charges, which offer was refused, and the master landed the property at another dock in the city, instructing the custodian not to deliver the same to the owners except on payment of the one hundred and fifty dollars. The owners demanded the property, delivery was refused, and they brought replevin therefor. Held, that by failing to perform his contract, no lien attached to the property for the freight agreed to be paid. That a partial performance is not sufficient, unless delivery be dispensed with or prevented by the owners; and that the dockage charges having been paid or tendered, the owners were entitled to the possession of the property, and upon refusal to deliver same, replevin would lie."<sup>53</sup>

§ 558. **The lien, how lost, satisfied or discharged.**—The lien having once attached can be retained in force only by possession of the property by the carrier. If possession is voluntarily surrendered to the consignee or owner, or to any other person not the agent or servant of the carrier, or under his control, the lien is lost. Of course, if the possession is merely given to an agent of the carrier, or to one of the servants, or to a person as custodian for the carrier of the property, the possession does not change, but still remains in the carrier and the lien could not be lost by such a delivery. And then, too, the carrier may surrender a part of the goods to the consignee and hold his lien on the balance for the whole amount of his charges.<sup>54</sup>

<sup>53</sup> Johnston v. Davis, 60 Mich. 56; Hill v. Denver, 13 Colo. 35, 4 L. R. A. 376; Evans v. Chicago, etc. Ry Co., 11 Mo. App. 463. "Held, a common carrier has not only the right to hold the goods and enforce a lien for its freight charges, but has a like lien for all freight bills paid by it to previous connecting carriers from the ini-

tial point of shipment." New York Cent. Ry. Co. v. Davis, 158 N. Y. 674.

<sup>54</sup> Fuller v. Bradley, 25 Pa. St. 120; Jeffris v. Pittsburg, etc. R. Co. 93 Wis. 250; Potts v. New York, etc. R. Co., 131 Mass. 455; Chicago, etc. R. Co. v. Union Packet Co., 38 Iowa, 377. Delivery of a portion of the goods

Where a railroad company allowed the owner to unload from its cars and place in bins on its premises a consignment of coal, and to carry away and dispose of a part of it, it was held that the carrier would not lose its lien for its freight and charges upon what remained.<sup>55</sup> But where the carrier put his refusal to deliver the goods to the owner upon the ground that they were not in his possession at the place where a demand is duly made, it was held that he waived his lien because the denial of possession excused the owner from making a tender of the carrier's charges.<sup>56</sup> And where goods were forwarded to a commission merchant by a steamboat, and were unloaded and placed on the wharf, and the bill of lading sent to the owner, who removed part of the goods without paying the freight, it was held that these facts did not amount to a delivery of the goods nor a waiver of the lien for freight, unless it was intended, of which a jury is to judge. The court say: "The goods, although put out of the steamboat on the wharf, were still in the possession of the agents of the boat, as it clearly appeared from the testimony; and the act of unloading a boat and placing the merchandise on the wharf does not indicate any intention to part with the possession of it until the freight is paid. Indeed, the law is that the officers cannot detain the goods on board the boat until the freight is paid, as the merchant or consignee would then have no opportunity of examining their condition. It was the duty of the carriers to send the bill of lading to the consignee to apprise him that the goods had arrived and were ready to be delivered, so that he could attend and examine their condition, pay the freight due and take them into his possession. Sending the bill of lading to him, therefore, amounted to nothing more than a communication of the fact that the goods had arrived and an offer to deliver them upon payment of the freight. No other inference arises from the act; nor could it justly create an implication that the delivery of the bill of lad-

on which the carrier has a lien for freight does not discharge the lien on the portion not delivered. *New York Cent. & H. R. Co. v. Davis*, 34 N. Y. S. 306; affirmed, 158 N. Y. 674; *N. H., etc. Co. v. Camel*, 128 Mass. 104, 35 Am. Rep. 360.

<sup>55</sup> *Dane et al. v. Old Colony, etc. R. Co.*, 14 Gray (Mass.), 143.

<sup>56</sup> *Adams Ex. Co. v. Harris*, 120 Ind. 73, 7 L. R. A. 214; *Vinton v. Baldwin*, 95 Ind. 433; *House v. Alexander*, 105 Ind. 109.

ing was intended to operate as a waiver of the lien for the freight and a delivery of the possession of the goods to the consignee."<sup>57</sup>

So it would appear that there must be an intention to deliver the property, and if the consignee should obtain the goods from the carrier by fraud or trick, it could not be held to be a delivery, and in such case the lien would not be lost.<sup>58</sup> But a mere mistake upon the part of the carrier in delivering the property, as, for example, believing that the consignee is responsible, or that he has other security for the payment of the freight, would invalidate the lien. And where property was shipped over the carrier's road with directions to deliver it to a dealer at its destination upon his surrendering the bill of lading therefor, but on its arrival, through the negligence of the carrier's agent, he received the goods from the warehouse of the carrier without surrendering or offering to surrender the bill of lading or pay the freight, and afterwards sold it to a *bona fide* purchaser, it was held that neither the shipper nor the carrier could recover the goods from the *bona fide* purchaser.<sup>59</sup> And where the carrier delivered the goods to an assignee for creditors of the consignee, it was held that the lien was not lost. The court said: "A carrier has a lien upon goods and right of detention until the freight is paid. If he parts with the possession out of the hands of himself and his agent he loses his lien upon them. When these goods were assigned they were not only for the general creditors of Pool, but for those who held liens upon the property assigned, so the assignee received the estate to be distributed according to the rights of the parties. He was acting in the trust capacity, and one of the beneficiaries of the trust was the appellant; so the delivery of the possession of the property to the assignee

<sup>57</sup> *Boggs & Russell v. Martin*, 13 B. Mon. (Ky.) 239, 243.

<sup>58</sup> *Bigelow v. Heaton*, 4 Denio (N. Y.), 496, 6 Hill (N. Y.), 43.

<sup>59</sup> *Norfolk, etc. Co. v. Barnes*, 104 N. C. 25, 5 L. R. A. 611. The court say: "We think this case falls within the principle declared in *Wilmington & W. Ry. Co. v. Kitchin*, 91 N. C. 39, 'that where one of two persons must suffer loss

by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss.' This doctrine is recognized in *State v. Lewis*, 73 N. C. 138; *Vass v. Riddick*, 39 N. C. 6; *State v. Peck*, 53 Me. 284; *Hern v. Nichols*, 1 Salk. 289."



was for the benefit of all of Pool's creditors, including appellant, according to their respective interest." <sup>60</sup>

Where a cargo of lath, sold by the consignee to the claimant before arrival, was discharged without notice to complainant of any lien or claim for freight and demurrage, it being customary in the port of New York to discharge cargoes from canal-boats before demanding freight and demurrage, and the laths, as fast as they were discharged, were received by the claimant and transported from the wharf to his lumber yard, some half mile distant, the claim for freight and demurrage against the consignee and shipper being afterwards disputed as to the amount, it was held that, as the delivery was unconditional, the lien had been lost. <sup>61</sup>

§ 559. — **Lien satisfied.**—The property is held by the carrier as security for the payment of his freight and proper charges. It goes without saying, therefore, that if the consignee pays the freight, or in any way satisfies the carrier for the amount of his claim, the lien will be satisfied. So, if the carrier extends the consignee credit for the freight or takes his note, or accepts other obligations which will be inconsistent with an intention to hold the property by virtue of his lien, the lien will

<sup>60</sup> *Caye v. Faßel, Assignee, etc.*, 49 L. R. A. 251. Where a mistake was made by the clerks of the carrier on account of misunderstanding as to the rate of freight upon certain articles delivered for shipment by the shipper afterwards, it was held that the carrier would not be held to the amount given the shipper by mistake, but that he would be entitled to compensation for the regular amount, and would have a lien upon the goods for that amount. *Rowland v. New York, etc. R. Co.*, 61 Conn. 103, 23 Atl. 755.

<sup>61</sup> *Eagan v. A Cargo of Spruce Lath*, 43 Fed. 480; affirming 41 Fed. 830. Where carloads of coal on reaching their destination were placed on spur tracks on the consignee's premises, he furnish-

ing the ties while the railroad company built the tracks and furnished the iron; the spur tracks being operated exclusively by the railroad company, and part of its charges was for placing the coal upon spur tracks; it being necessary to remove the cars from the spur tracks and move them along the main track, thence along a branch track of the consignee's premises to his docks before the consignee could handle the coal; this being done by an engine and crew of the railroad company, which the superintendent furnished on request it was held that placing the cars on the spur tracks was not a delivery of the coal so as to deprive the railroad company of its lien for freight. *N. Y. Cent. & H. R. Co. v. Davis*, 158 N. Y. 674, 34 N. Y. Sup. 206.

be held to be void.<sup>62</sup> And where the carrier had negligently delayed delivery of the goods so that his liability for damages therefor was equal to or greater than the amount of the freight, it was held that the consignee could maintain replevin without tender of the freight.<sup>63</sup> But the carrier will at all times be excused from liability where the damage is the result of the act of God, the public enemy, or the acts of the shipper; in fact, the limitations upon the liability of the carrier will be applied; and if the damage results from any of these causes, it will not defeat the lien or become an offset in an action for the freight.<sup>64</sup>

§ 560. — **The lien discharged.**—The carrier holds the goods to secure him for the payment of the freight and charges. The lien is therefore only to the extent of the amount due the carrier. A payment of this amount, as we have seen, will discharge the lien. It therefore follows that a tender of the full amount of the charges that are due the carrier, and for which he holds the property, would operate as a discharge of the lien. The carrier has no further or other interest in the goods, and whenever the consignee offers by tender to pay this amount the goods must be released. If a tender is made of the amount that is justly due to the carrier, and the carrier should refuse to accept the tender and release the goods, the consignee could recover them by an action of replevin, or the amount of their value in trover.

“It is a general rule of law that where a person holds a lien upon property, a tender by the owner of the property of the amount of the lien will discharge it. In fact, the detention of the goods upon a different and inconsistent ground will be a waiver of the lien. It is a well-settled rule in the law of pledges that if the money for which the goods are pawned be tendered to the pawnee, and he refuses to receive it, he becomes thereby a wrong-doer, and his special property in the chattel is determined. . . . The principle governing the subject is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities. The instantaneous effect is to

<sup>62</sup> *Secord v. Buffalo, etc. Co.*, 5 Blatch. 525.

<sup>63</sup> *Moran Bros. Co. v. Northern Pac. R. Co.*, 1 Wash. 53; *Bancroft v. Peters*, 4 Mich. 619.

<sup>64</sup> *Galt v. Archer*, 7 Grat. (Va.) 307; *Newhall v. Vargas*, 15 Me. 314.

discharge any collateral lien as a pledge of goods or a right of distress. Upon these principles it has been held that if the debtor tender the debt to the pledgee, and he refuse to deliver up the pledge, he is liable, though it be subsequently lost, or even forcibly taken from him."<sup>88</sup>

<sup>88</sup> *Tiffany v. St. Johns*, 65 N. Y. 314, 318, 22 Am. Rep. 612; *Winter v. Bernard*, 2 Ld. Raym. 909; *v. Colt*, 7 N. Y. 388; *Weeks v. Kortright v. Cady*, 21 N. Y. 366.

## CHAPTER XI.

### TERMINATION OF THE CARRIER'S LIABILITY—HIS LIABILITY AS A WAREHOUSEMAN AND HOW DISCHARGED.

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578. — Usage — Course of dealing.

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592. *Stoppage in transitu* — Duty of carrier — Termination of liability.

§ 561. **Delivery of the goods to the consignee.**—The object of the employment on the part of the shipper is, that the goods may be safely carried and delivered to the consignee. The carrier undertakes to do this and so the duty of the carrier is plain. He must carry and deliver the goods to the consignee or his

order, and to no one else, at a proper time and at a proper place. The liability of a common carrier as an insurer continues until he has so delivered the goods to the consignee or the person lawfully entitled to receive them, or until the happening of that which excuses such delivery and permits him to hold the goods as a warehouseman or deliver them to some other warehouseman. "It is the settled doctrine of England and this country that there must be an actual delivery of the property to the proper person. . . . And in no other way can the carrier discharge his responsibility except by proving that he has performed such engagement, or has been excused from the performance of it, or been prevented by the act of God or the public enemy.<sup>1</sup> And where the action was for failure of an express company to carry and deliver a package of money, the supreme court of Illinois in their opinion thus forcefully and tersely state the obligations of the carrier: "They (the defendant company) became insurers for its safe delivery; being so, nothing can excuse them from their obligation safely to carry and deliver but the act of God or the public enemy. This rule of the common law, the rigid application of which has given so much satisfaction and security to the commerce of nations, is properly invoked in cases like this."<sup>2</sup>

The supreme court of Illinois, adopting the language of Hutchinson on Carriers,<sup>3</sup> in the case of *Pacific Exp. Co. v. Shearer*,

<sup>1</sup> *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107; *Am. Exp. Co. v. Stack*, 29 Ind. 27; *Price v. Oswego, etc. Co.*, 50 N. Y. 213.

<sup>2</sup> *U. S. Exp. Co. v. Hutchins*, 67 Ill. 349; *Baldwin v. Am. Exp. Co.*, 23 Ill. 197, 17 Am. Dec. 190. In *Pacific Exp. Co. v. Shearer*, 160 Ill. 215, 37 L. R. A. 177, it was held "that a carrier is an insurer of the safe delivery of the goods to the person to whom they are consigned."

<sup>3</sup> *Hutch. on Carriers*, sec. 344; *Northern Pac. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727; *Indianapolis, etc. R. Co. v. Herndon*, 81 Ill. 143; *Erie Dispatch Co. v. Johnson*, 87 Tenn. 490; *Mo. Pac. Ry. Co. v. Heidenheimer*, 82

*Tex.* 201; *Howard v. Old Dominion Co.*, 83 N. C. 158, 35 Am. Rep. 571; *Ela v. Am., etc. Exp. Co.*, 29 Wis. 611, 9 Am. Rep. 619; *Atchison, etc. R. Co. v. Schrivor*, 72 Kan. 55, 84 Pac. 119, 4 L. R. A. (N. S.) 1056. Direction in a bill of lading to notify a certain person of the arrival of goods which are consigned to the order of the consignor or of a third person, does not justify the carrier in delivering the goods to the person whom it is directed to notify, without the production of the bill or shipping receipt properly indorsed, and if the carrier does deliver the goods to him under such circumstances it is liable for the value thereof to the holder of the bill or shipping receipt. North-

above cited, say: "No circumstances of fraud, imposition or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of the identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned."<sup>4</sup>

Because of this rigid, unalterable rule as to the delivery of the property by the carrier, the carrier will be fully protected in his efforts to avoid mistake or wrong delivery of the goods. He has a right to make thorough investigation, acting at all times in good faith as to the identity of the person claiming the goods. Where goods had been delivered and carried to their destination, and the carrier refused upon demand to deliver them to the plaintiff, who claimed to be the consignee, coupling the refusal with an offer to deliver the goods if the plaintiff would produce any papers showing ownership or authority to receive them, it was held "that it should have been submitted to the jury whether the refusal was qualified, and, if so, whether the qualification was reasonable and was the true reason for not delivering the goods." The court say: "The defendants were bailees of the property, under an obligation to deliver it to the rightful owner. They would have been liable had they delivered the goods to a wrong person. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as

ern Pa. R. Co. v. Commercial Nat. Bk., 123 U. S. 727, 31 L. Ed. 287; Southern R. Co. v. Atlantic Nat. Bk., 50 C. C. A. 558, 56 L. R. A. 546; Libby v. Ingalls, 124 Mass. 503.

<sup>4</sup>Liability of carriers for delivery of goods to wrong persons, see Southern R. Co. v. Webb, 143 Ala. 304, 5 Am. and Eng. Ann.

cases, 97 and notes page 100, where a large number of cases are collected and the principle fully stated. Gibbons v. Farwell, 63 Mich. 344; Forbes v. Boston, etc. R. Co., 123 Mass. 154. North Pa. R. Co. v. Commercial Bk., 123 U. S. 277; St. Louis, etc. R. Co. v. Larned, 103 Ill. 293.

a conversion. The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery."<sup>5</sup>

As we have seen, the refusal to deliver the goods must be in good faith and upon reasonable grounds. If the carrier refuses simply for the reason that he desires to deprive the consignee of the possession of the goods, or for personal reasons, or to gratify others, or voluntarily undertakes to retain the property in his possession, he would be liable in an action as for conversion of the property. And so where a carrier refused to deliver consigned carloads of freight to the consignees because they entered into a combination to resist the enforcement of rules providing demurrage for the unreasonable detention of cars, it was held that the carrier would not be justified.<sup>6</sup>

§ 562. — **The bill of lading.**—The usual course of business in shipping goods, where a bill of lading is delivered to the shipper, has been stated. But by way of illustration it is perhaps proper to recall that subject in connection with the delivery of the goods. In cases where the original bill of lading has been forwarded to the consignee or has been by him indorsed and delivered to a third person, or where the bill of lading has been sent through the bank with draft attached, upon which the shipper at his home bank has received advances, the only security for these advances, and the only real safety of the shipper or his indorsee, is in the rigid rule of law that demands without exception that the carrier shall deliver the goods only to the person to whom they are consigned, and that he will follow explicitly the directions given him in the bill of lading. And so the carrier has the right to demand, and should always demand before de-

<sup>5</sup> *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 24, 6 Am. Rep. 28. In *Baltimore & Ohio R. Co. v. Humphrey*, 59 Md. 390, it was held that "the carrier will be protected in refusing delivery until reasonable evidence is furnished

that the party claiming the goods is the person entitled, so long as they act in good faith and solely with a view to a proper delivery."

<sup>6</sup> *Kentucky Wagon Mfg. Co. v. Railroad Co. et al.*, 98 Ky. 152, 26 L. R. A. 850.

livering the goods, the original bill of lading that was issued at the time of the shipment, in order that he may know that all the conditions have been fulfilled, and that the goods are being delivered to the person legally entitled thereto. The carrier always assumes the risk, when he delivers the goods, that he has delivered to the person entitled to receive them, and so should require the bill of lading to be produced.

Where a car of goods were shipped, the shippers consigning them to themselves, and at the same time drawing for the amount of their value by attaching a draft to a bill of lading, upon a third party, the carrier delivering the goods without requiring the production of the bill, it was held that the carrier was liable for the amount of the draft. The court say:<sup>7</sup> "The agent delivered the car without the bill of lading and without an acceptance of the draft. This he had no right to do. The title to the property remained in the consignors until delivery in accordance with the conditions. Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsee with a constructive custody which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading and to the person entitled to receive the same. There could be no delivery except in accordance with the bill of lading.<sup>8</sup> Ordinarily the owner of the goods may direct their delivery, when there is no bill of lading assigned or indorsed, to a *bona fide* holder; that is, to a person who has in good faith advanced money upon the bill by payment of a draft, or who has accepted a draft attached to the bill of lading. Where the draft has been paid, or accepted under such circumstances, the goods, to the extent of the amount of the draft, together with the right of possession, have passed to the acceptor or payer of the draft, and the carrier cannot relieve himself of liability until he delivers the goods to such consignee or indorsee of the bill, for in such case the shipper and former owner have constructively delivered the property to such an indorsee.

<sup>7</sup> *Pacific Ry. Co. v. Stern & Spiegle*, 119 Pa. St. 24.

<sup>8</sup> *Boatmen's Savings Bank v. West*, etc. R. Co., 81 Ga. 221; *Furman v. Union Pac. Ry. Co.*, 106

N. Y. 579; *Heiskell v. Bank*, 89 Pa. St. 155; *Dows v. Bank*, 91 U. S. 618; *Stollenwerck v. Thatcher*, 115 Mass. 224; *Benj. on Sales*, § 332.



Where a bill of lading, by the terms of which the goods are consigned to the order of the consignor, is indorsed in blank and negotiated for value as security for a draft drawn by the consignor on a third person, the court held that the carrier has no right to deliver the goods to such third person without production of the bill of lading or authority from the holder thereof, and the rights of the holder of such draft and bill of lading in good faith and for value against the carrier are not affected by subsequent fraud of the consignor of which said holder had no notice. And where a consignor of grain drew on the consignee with the bill of lading attached, and the consignee paid the draft with money obtained from bankers on the security of a transfer of the bill of lading to them, the consignee becoming insolvent, the carrier, without demanding the bill of lading, delivering the grain to the consignor, it was held that the carrier was liable to the bankers for the value of the grain, notwithstanding the consignee was largely indebted to the consignor.<sup>9</sup> But where bills of lading for grain were duly indorsed and pledged to a bank as collateral for a note, and the bank was in the habit of permitting the pledgor to withdraw bills and substitute others for the purpose of allowing the pledgor to obtain the freight, and the pledgor withdrew certain bills, presented them to the railroad company, obtained the freight, and returned them to the bank, it was held that the carrier was not liable therefor to the bank.<sup>10</sup>

§ 563. Rules as to the delivery applicable to all carriers.—The rule requiring delivery of the goods to the proper consignee is applicable to all common carriers without exception, whether they be carriers by water or by land; whether it be heavy freight or express packages. "All classes of common carriers are responsible, and equally responsible, for a loss of the goods by delivery of them to the wrong person."<sup>11</sup>

<sup>9</sup> Wells v. Oregon, etc. R. Co., 32 Fed. 51.

<sup>10</sup> Douglass v. People's Bank, 22 Am. & Eng. Cases, 510.

<sup>11</sup> Winalow v. Railway Co., 42 Vt. 700, 1 Am. Rep. 365, citing Stevenson v. Hart et al., 4 Bing. 476, 13 E. C. L. 596; Duff v. Budd, 3 Brod. & Bing. 177, 7 E. C. L. 671; Fletcher v. American Exp.

Co., 15 Am. L. Reg. 21; National, etc. Banking Co. v. Delaware, etc. R. Co., 70 N. J. L. 774, 58 Atl. 311. May deliver to duly authorized agent. Brunswick, etc. R. Co. v. D. Rothchild & Co., 119 Ga. 604, 46 S. E. 830. Duty to deliver to consignee. Burr v. Adams Express Co., 71 N. J. 263, 58 Atl. 609.

§ 564. **The requirements of the carrier upon arrival of the goods at destination.**—The requirements of the carrier upon the arrival of the goods at their destination, and the manner of terminating their liability, varies somewhat, depending upon the kind of carrier that has the goods for carriage; that is to say custom and the general course of business has fixed upon the express company the requirement of making a personal delivery in cities and towns of enough importance to warrant sufficient business so that the company can reasonably afford messengers to do this work; and in such case the company, by its agents, are expected to find the consignee and deliver the goods, and not wait for him to call for the package after having been notified. But in places where the express companies have no messengers to make personal delivery of packages, they are required to notify the consignee of the arrival of the package, and after the consignee has had reasonable time to call and receive the same, the carrier will become liable as a warehouseman—the extraordinary liability ceasing. But in case of railroad companies and carriers by water, the requirement is very different. The express companies generally carry small packages of freight; they employ agents who drive their wagons, carry their goods to every part of the city and deliver them to the several consignees. But the railroad or steamship is confined to the particular limits that the water-course or track has made for them. And then, too, they generally carry heavier freight, and it would not be practicable, nor has it ever been required, that they should make personal delivery to the consignee, except at their wharves or freight depots.

As to just what is required of them the authorities are not all in accord. Some of the courts hold that the railroad or steamboat companies are not bound even to send notice to the consignee of the arrival of the freight, but that they may unload it into their warehouses, or, if in car lots, place the cars where they may be conveniently unloaded, and if not called for within a reasonable time their liability as carriers ceases, and they become liable only as warehousemen; while other courts hold that it is the duty of the carrier to give the consignee notice (sending notice through the mail is generally sufficient), and after waiting a reasonable time for the consignee to receive the goods the extraordinary liability of the common carrier ceases, and he be-

comes liable as a warehouseman. The several holdings will be discussed later.

#### EXPRESS COMPANIES.

§ 565. **Requirements as to delivery.**—Express companies are required to make personal delivery of the goods intrusted to them for carriage except in cases noted; and until delivered to the consignee, unless a reasonable excuse for non-delivery exists, the company's liability as a common carrier continues. What effort the agent of the company should make to deliver the goods before their liability as a common carrier will be terminated and their liability as warehouseman commence is a question that has been very much discussed. If the goods are addressed to the consignee and the street number given, it is the duty of the carrier to look for him there, and if found deliver to him the goods; but if he is not found, or if no street number is given nor sufficient address, in such case it is the duty of the carrier to make reasonably diligent efforts to find the consignee and deliver to him the goods. No fixed legal definition can be laid down as to what is reasonably diligent effort; it would vary in each case, and would be governed by circumstances. It can only be said that it must be such an effort as a reasonably prudent man would make under just such circumstances in an important business affair of his own. It therefore follows that it is a question for the jury.<sup>12</sup>

<sup>12</sup> In *Witbeck v. Holland*, 45 N. Y. 13, where the company was held not to have exercised reasonable diligence in finding the consignee, the facts proven were that the agent of the company looked in the directory of the city and did not find the name; the next day addressed a notice to Martin Whitbeck instead of Witbeck. Two or three days after he inquired of two men, and afterwards of the city treasurer, if they knew Martin Whitbeck (not Witbeck). No further efforts were made; the package was deposited in the company's safe and afterwards taken by burglars.

The court say: "It appeared in the present case that the defendant had its vehicles by which they carried articles to the consignees in the city of Schenectady, which had arrived there by rail under contracts with the company for the transportation. This is the usual course of transacting business by such companies; were it otherwise, the business done by these companies would be greatly diminished, as it would be equally advantageous in many cases to have the property transported by the railroad company. When the defendant received the package from the Adams Company at

§ 566. **When the express company becomes warehouseman.**—When the liability of a common carrier ceases in the case of an express company, and that of a mere warehouseman takes its place, depends entirely upon the efforts used to make a personal delivery of the goods, or upon a refusal of the consignee to receive them when tendered by the company. The prime and paramount duty of the express company is to place the property intrusted to it in the hands of the consignee, but no impossible or unreasonable requirements will be laid upon the company; and so when the agents of the company have answered all reasonable requirements as to delivering the property and have failed, and the goods are still in their possession, their extraordinary liability as insurers will cease; they will be permitted to store the goods, and their liability will be that of a warehouseman required to exercise ordinary diligence.

§ 567. **Express company's liability as warehouseman.**—In this connection it may be said that there are at least two occasions when an express company's liability is that of a warehouseman: (1) When the goods are delivered to it, but not for immediate shipment; something remains to be done before they are sent forward; and (2) when at their destination they cannot for good and sufficient reasons be delivered to the consignee, or to any person authorized to receive them.<sup>13</sup>

New York, consigned to Martin Witbeck, Schenectady, it became liable as carrier for its carriage to Schenectady and its delivery to Witbeck, there, if with reasonable diligence he could be found. The performance of this entire service was contracted for by its receipt so addressed, and had the defendant received it from the plaintiff at New York and given him a receipt for its transportation, the obligation to make personal delivery at Schenectady would have been incurred. . . . The diligence which the law required of the defendant was such as a prudent man would have used in an important business affair of his own. The evidence shows that the defendant was so

inattentive as to mistake the surname of the consignee. Although the package was addressed to Witbeck, all its inquiries were made for Whitbeck. This may have prevented their finding him. It further appeared that its inquiries were confined to a few persons in the vicinity of its place of business, and that by these it obtained information of other persons of a like surname, one of whom was the father of the consignee. Surely inquiry should have been made of these persons, and had it been so made, delivery would have been made and the loss would never have occurred." *Brown v. Wier*, 88 N. Y. S. 479.

<sup>13</sup> *Barron et al. v. Eldridge et*

§ 568. — **Duty of express companies when goods are refused by consignee.**—While there can be no doubt that after the goods have been properly tendered to the consignee and he has refused to receive them, the status of the express company is

al., 100 Mass. 455. The court say: "The responsibility of a common carrier for goods intrusted to him commences when there has been a complete delivery for the purpose of immediate transportation. If, without putting them in transit, the carrier, for his own temporary convenience, places them in store, still the liability of a carrier attaches. The delivery must be for immediate transportation, and, of course, it cannot be complete if anything remains to be done by the shipper before the goods can be sent on their way. If by the usage and course of business, and especially if by express request, the shipment is delayed for further orders as to their destination, or for the convenience of the owner, then, during the time of such delay, the liability is that of warehouseman. The more stringent liability of a common carrier only attaches when the duty of immediate transportation arises. It then shifts from that of warehouseman, although the goods remain unmoved in the storehouse. Whether the responsibility be in one capacity or the other is seldom a matter of express agreement between the parties. It arises out of the relation which the parties sustain, and the duties which the law imposes." *Southern Ex. Co. v. McVeigh*, 20 Grat. (Va.) 264. After unsuccessful effort to deliver the goods. *Hasse v. Express Co.*, 94 Mich. 133. In *Marshall et al. v. Am. Exp. Co.*, 7

Wis. 1, where it appeared that the express company tendered a package received for a bank to a person in the bank authorized to receive it, but after banking hours, and placed his refusal upon the ground that their vault was locked and the keys were taken away by the cashier, that the agent of the express company placed said package in the iron safe of the company and securely locked it, and that it was afterwards burglarized and the package lost, it was held that the express company was not liable as common carriers. The court say: "If he was the person so authorized by the consignee, it was wholly immaterial whether the plaintiffs had notice of it or not. It was of no consequence to them who such person was, whether the cashier, the teller or the porter. And most certainly the defendants are not to be affected by their want of notice. We do not wish to be understood as deciding, or intending to intimate, that it is the duty of the bank to keep its vaults and doors open, and persons in attendance, for the reception of such packages, after the business of the day is entirely closed. That question is not before us. In this case the express messenger gained access to the counter of the bank, and a properly authorized agent was present to receive the packages. If these views are correct, it follows as a necessary consequence that the defendants' duties as common car-

that of a warehouseman, the question as to what further duty devolves upon the company respecting the goods and the parties is one of importance. The goods are in the custody of the express company; it has received them for carriage and delivery to the consignee. Sound judgment and discretion would dictate, and it is certainly the law, that the company would be under obligations to at once notify the consignor of the refusal of the consignee to accept the goods. Good faith and fair dealing, as well as reasonable diligence, would demand this. Ordinarily the presumption is that the consignee is the owner of the goods; that therefore he has the right to control them; but in this case, where he refuses to receive them, this presumption no longer obtains; on the contrary, in such case the carrier would be bound to presume that the consignor is the owner of the property, and therefore the carrier must look to him for further directions as to what shall be done with it; but if the consignee is the owner, and the carrier has knowledge of that fact, then he may store the goods and notify the consignee of that fact, and further, that they are stored subject to his order, giving him notice of the place where they can be found.<sup>14</sup>

§ 569. — **Goods sent C. O. D.**—If the goods are sent C. O. D., that is, “collect on delivery,” the express company can only terminate its liability by the delivery of the goods to the consignee, or making the necessary effort to do so, and collecting the amount claimed by the accompanying instructions and returning the same to the consignor. In such case it is the duty of the company on receipt of the goods, to at once notify the consignee, and offer to deliver to him the goods on payment of the amount named in the instructions. If the company should deliver the goods without receiving the amount of the collection, it would be liable to the consignor in that sum.<sup>15</sup> But where, by the terms of the bill of lading, the goods were not to be delivered until the bill should be produced and the price of the

riers were discharged, and their liabilities, as such, at an end, and, whatever may have been their character, as bailees, afterwards, we think they were certainly liable for gross negligence only, and if so, that matter was properly submitted to the jury.”

<sup>14</sup> *American, etc. Exp. Co. v. Wolf*, 79 Ill. 430. Reasonable time to consignee, etc., *Burr v. Adams Exp. Co.*, 58 Atl. 609.

<sup>15</sup> *Murray v. Warner*, 55 N. H. 546, 20 Am. Rep. 227; *United States Exp. Co. v. Keefer*, 59 Ind. 266.

goods paid, yet where the consignor, after notice that the goods had been delivered without the production of the bill, and that payment had not been made, drew a draft upon the consignee, took an acceptance thereof and undertook its collection through a bank, it was held that the consignor thereby abandoned the original purpose of requiring payment on delivery, and whether the draft is collected is immaterial.<sup>16</sup> This course of business is sometimes adopted in the sending of freight by railroad companies; instructions being written in the contract of shipment to deliver the freight upon payment of a certain amount of money. The same course of business and the same rules of law are applicable in such cases as in the case of express companies, with the exception that the railroad company need not deliver the freight personally to the consignee, but may simply give him notice and collect the amount when the freight is delivered at its office. The same liability, however, would be incurred by the railroad company as is incurred by the express company in such like cases.

§ 570. **Where consignee fails to receive the goods or refuses to receive them.**—It is generally understood that consignors of C. O. D. goods expect the express companies to hold the goods for a reasonable time if necessary, and to make a reasonable effort to collect the amount due and deliver the goods, even after the consignee has failed to take the goods when first offered. Under such circumstances there is nothing to be done by the company but to store the goods in their warehouse and for a time await the action of the consignee. In such case the law will not hold the company to the extraordinary liability of a common carrier, but merely as a warehouseman, and such would be its liability if the consignee refused the goods; but in any case the carrier should notify the consignor and hold the goods for further instructions.<sup>17</sup>

§ 571. — **Right to inspect the goods sent C. O. D.**—Ordinarily the relation created between the carrier and the consignor, when the goods are forwarded C. O. D., is that of principal and agent; the carrier assuming to carry the goods as directed, deliver them to the consignee, collect the amount demanded in the

<sup>16</sup> Southern Ry. Co. v. Kinchen, 103 Ga. 186; Rathbun v. Steamboat Co., 76 N. Y. 376.

<sup>17</sup> Hasse v. Express Co., 94 Mich. 133; Weed v. Barney, 45 N.

Y. 344; Zinn v. Steamboat Co., 49 N. Y. 442; Express Co. v. Darnell, 31 Ind. 20; Marshall v. Express Co., 7 Wis. 1.

bill and return it to the consignor. But the consignor by this method will not be allowed to obtain an unfair advantage over the consignee by requiring him to receive and pay for goods he did not bargain for. And so it has been held that the carrier, unless expressly instructed not to do so, may afford him a reasonable opportunity of ascertaining, before parting with his money, if the package contains the goods he ordered. The company, however, must follow the instructions of the consignor, and when an inspection was allowed contrary to instructions, and the consignee without cause refused to take the goods and pay the amount, the carrier was held liable to the consignor for damages. But where a package of goods was forwarded by a carrier to be paid for on delivery, it was held that the consignee was entitled to a reasonable opportunity to inspect them before he accepted them, and that the carrier could afford him reasonable facilities for doing so without making himself chargeable for the price, even if he put them into the hands of the consignee for that purpose and received from him the price as personal security to the carrier that the goods should be returned if not accepted after a reasonable opportunity to examine them.<sup>18</sup>

**§ 572. Carrier may assist in preventing fraud on the part of consignor.**—This manner of collection for goods sent by express, or otherwise, cannot be used to perpetrate fraud upon a consignee; and so it has been held that the carrier will be allowed to render assistance to prevent its perpetration; and when it clearly appears on examination of the goods that the consignor is undertaking to commit a fraud upon the consignee, the carrier may at any time before the money has been remitted return the amount paid to the consignee, and the goods to the consignor; indeed, it has been held that this is the duty of the carrier. "An express company may receive a parcel to be delivered to the consignee only on payment of the sum directed to be collected upon it. And if the consignor forbids the consignee to inspect the contents of the parcel until such payment is made, it is the duty of the company to obey the direction. But if the company should, in violation of the prohibition, permit an examination of the contents of the parcel, and the consignee should

<sup>18</sup> *Lyon & Co. v. Hill & Co.*, 46 H. 316; *Brand v. Weir*, 57 N. Y. N. H. 49; *Wiltse v. Barnes*, 46 S. 731, 27 Misc. 212; *Sloan v. Iowa*, 210; *Wilson v. Elliot*, 57 N. Railway Co., 126 N. C. 487.



refuse, without cause, to receive it and pay the sum required, it may be the company would be liable to the consignor for damages. It is unnecessary to consider that question in this case. But if an inspection is permitted and the contents are found to be valueless, it may be safely declared that the company would not be liable in damages to the party who was guilty of the attempt to defraud the consignee. It is also true that if the consignee should pay the charges, and then, on opening the parcel, should find the contents to be of no value, he would be entitled to recall the money paid at any time before it was paid over to the consignor. The agent would be liable to refund, if the money remained in his hands at the time it was demanded by the consignee. The illegality of the transaction would be a perfect defense to the company against the consignors. . . . There could be no recovery by the consignors against the express company or the plaintiff. This fraud intended and attempted was a perfect answer to the action." Such is the language of the court in *Herrick v. Gallagher*.<sup>19</sup>

#### CARRIERS BY WATER.

§ 573. **Termination of liability.**—In an early case in Massachusetts (1826), *Chickering v. Fowler*,<sup>20</sup> it was held that "a promise by a master of a vessel to deliver goods to a consignee does not require that he should deliver them to the consignee personally, or at any particular wharf. It is sufficient if he leaves them at some usual place of unloading, giving notice to the consignee that they are so left. If, after such notice, the consignee refuses to receive the goods, it is the duty of the master to take care of them for the owner, unless the consignee is under an obligation to receive them, in which case they will be at his risk."

Carriers by water are under no obligation to make personal delivery of goods, and so it would seem that their liability as common carriers can be terminated not only by delivering the goods to the consignee, or the person entitled to them, but by giving to such person a reasonable notice of their arrival and his readiness to deliver them; and after failure on the part of the consignee to collect and receive them and pay the charges; or on his refusal to accept; or, if the person who is entitled to receive the goods cannot be found by the carrier after a reasonably diligent effort

<sup>19</sup> 60 Barb. (N. Y.) 566, 575.

<sup>20</sup> 4 Pick. (Mass.) 371.

has been made to find him, the carrier's extraordinary liability as an insurer would terminate and he would be held to the liability of a warehouseman, liable only for ordinary negligence and required to exercise ordinary diligence. If the consignee refuses to accept the goods, or cannot be found, the carrier should notify the consignor, for in such case it would be presumed that the consignor is the owner of the goods.

§ 574. **Carrier must be reasonably diligent in giving notice to consignee.**—Carriers of whatever kind or nature are required to be diligent in the matter of giving notice to the consignee of the arrival of the goods at their destination, and their readiness to deliver the same, and if negligent in this, and the goods are lost or damaged, the carrier would be liable. Especially must the carrier be diligent and prompt where the property shipped and received is perishable. And so where goods were shipped in Pennsylvania to the city of Chicago, directed to the consignee, whose name was placed upon the box, and also the number of his place of business, and on their arrival by water a letter was mailed to him without giving his number, and in consequence thereof was returned, and the goods were destroyed by fire, it was held "that the carrier was liable to the owner for a failure to direct the notice to the consignee at his business house."<sup>21</sup>

<sup>21</sup> In *Zinn et al. v. New Jersey Steamboat Co.*, 49 N. Y. 442, the court say: "Common carriers assume not only the safe carriage and delivery of property to the consignee, but also that merchandise and other property received by them for transportation shall be carried to the place of destination and delivered with reasonable dispatch; and for any unreasonable delay, either in the transportation or its delivery after its arrival at the terminus of the route, they are responsible. *Hand v. Baynes*, 4 Whart. (Pa.) 204; *Raphael v. Pickford*, 6 Scott Ch. N. R. 478; *Blackstock v. N. Y. & E. R. Co.*, 20 N. Y. 48; *Black v. Baxendale*, 1 Exch. 410. The liability of the carrier to answer for the non-delivery of goods, or the

want of reasonable expedition in their delivery, after arrival at the place of their destination, was not controverted upon the trial. The defendant in this action was not bound to deliver the merchandise to the consignees at their place of business. A delivery or offer to deliver at the wharf would have discharged the carrier from all responsibility as such carrier. Carriers by water or railroad are not held to a delivery of goods to the consignees at any place other than at the wharf of the vessel or the railroad station, and a notice to the consignee of the arrival of the goods, and of a readiness to deliver, comes in place of a personal delivery, so far as to release the carrier from the extraordinary and stringent liability

§ 575. **Must provide suitable place for landing and caring for goods.**—It is said that “by the general usage of commercial and maritime law a carrier by water must carry from port to port or from wharf to wharf. He is not bound to deliver goods at the warehouse of the consignee; it is the duty of the consignee to receive his goods out of the ship or upon the wharf.”<sup>22</sup>

incident to that class of ballees. *Gibson v. Culver*, 19 W. R. 305; *Flisk v. Newton*, 1 Den. 45; *Fenner v. Buff. & St. L. R. Co.*, 44 N. Y. 505. If the consignee is present, the goods may be tendered or delivered to him personally, and he is bound to remove them within a reasonable time. If he is not present, he is entitled to reasonable notice from the carrier of their arrival, and a fair opportunity to take care of and remove them. If the consignee is unknown to the carrier, the latter must use proper and reasonable diligence to find him; and if, after the exercise of such diligence, the consignee cannot be found, the goods may be stored in a proper place, and the carrier will have performed his whole duty, and will be discharged from liability as a carrier. But for want of diligence in finding the consignee and giving notice of the arrival of the goods, the carrier is liable for the damages resulting from a delay in the receipt of the goods by the consignee occasioned by such want of diligence. He can only relieve himself from liability by storing the goods, after, by the use of reasonable diligence, he is unable to find the consignee. *Witbeck v. Holland*, 45 N. Y. 13. A common carrier has not performed his contract as carrier until he has delivered or offered to deliver the goods to the owner, or done what the law es-

teems equivalent to a delivery. *Smith v. Nassau & Lowell R. Co.*, 7 Foster (N. H.), 86; *Price v. Powell*, 3 Comst. 322. When the consignee is unknown to the carrier, a due effort to find him is a condition precedent to a right to warehouse the goods, and as notice to the consignee takes the place of a personal delivery of the goods, and as a due and unsuccessful effort to find the consignee will alone excuse the want of such notice, it follows that if a reasonable and diligent effort is not made to find the consignee, the carrier is liable for the consequence of the neglect. What is a due, a reasonable effort, and what is proper and reasonable diligence, depends necessarily very much upon the circumstances of each case, and, in the nature of things, is a question of fact for the jury, and not of law for the court. What would be reasonably sufficient in one place might be entirely inadequate and insufficient in another, and the extent and character of the inquiries to be made, in the exercise of a reasonable diligence on the part of the carrier, cannot be regulated or prescribed by any fixed standard, as the standard must shift with the varying circumstances of each case.” *Westchester & Phila. R. Co. v. McElwee*, 67 Pa. St. 211.

<sup>22</sup> *Dibble v. Morgan*, 1 Woods, 406.

While this may, under certain conditions and circumstances, be true, there are times and conditions when the consignee cannot be notified in time; when the ship must be unladen before a reasonable time can be given the consignee to appear and receive his goods; and it is held, and there is no serious opposition to the holding, that the ship's master cannot terminate the liability of the ship's owner as a common carrier by unloading the goods upon the wharf and leaving them there, unless it is done in compliance with a clearly-established course of business between the parties in relation to the mode of delivering the goods.<sup>23</sup> "A discharge from the vessel at a proper place, seasonable hour, and upon due notice to the consignee, does not discharge the carrier from all responsibility for the safety of the goods. It may, under some circumstances, be regarded as a delivery to the consignee, and a performance of the contract of affreightment, so as to discharge the shipowner from the stringent liability of a carrier; but such cases are exceptional, and as a rule, if for any reason the consignee does not appear to claim the goods, or does not receive them, it is the duty of the carrier to provide a proper place of deposit, or in case of imported goods, subject to duty, to see that they are in proper custody. The general rule is, and to it there are no recognized exceptions, if the consignee is unable or refuses to receive the goods, the carrier is not at liberty to leave them on the wharf, but it is his duty to take care of them for the owner. . . . It follows that until this is done the liability of the carrier continues. If it be conceded that a carrier by water may discharge himself from liability by delivering merchandise upon a wharf, with notice to the consignee, the latter is entitled to a reasonable time to remove them, and they are at the risk of the carrier until a reasonable time for such removal has elapsed; and a right to put the goods in store for the consignee does not exist until the latter has had a reasonable time for their removal." This is the language of the court in *Redmond v. Liverpool, etc. Steamboat Co.*<sup>24</sup>

<sup>23</sup> Story on Bailm., sec. 545; *Os-trander v. Brown*, 15 Johns. (N. Y.) 39; *Fisk v. Newton*, 1 Denio, 45; 2 Kent's Com. 605. In *Richardson et al. v. Goddard et al.*, 23 How. (U. S.) 28, the court say: "When the goods are not accepted

by the consignee, the carrier should put them in a place of safety, and when he has so done he is no longer liable on his contract of affreightment."

<sup>24</sup> 46 N. Y. 578, 583.

It has been held, and it seems to be in harmony with the weight of authority upon the subject, "that where delivery cannot be made at the point of destination, such prudent care of the goods and their diligent and safe delivery, with notice to the consignee or owner, as best comports with the interest of the owner according to the circumstances, will excuse the carrier; but it devolves upon the carrier to allege and prove such matter of excuse."<sup>25</sup> So it would appear that not only is the master of the ship, or the ship's owner, bound to give notice, but he must give reasonable notice so that the consignee can have reasonable time to obtain the goods. And then, too, the goods must be in a suitable condition for removal; so separated from the mass of their goods unloaded that the consignee may select them. It would follow, therefore, that the ship's owner must provide a suitable place for landing and taking care of the goods he carries until they can be delivered to the consignee.

§ 576. — **Notice must be actual, and for a removal of goods at a proper time, if time fixed.**—The notice of the arrival of the goods, and of the readiness of the carrier to deliver them, must be an actual notice to the owner or consignee; it would not be sufficient to give a public notice, as by printing in a newspaper or posting in a public place. Then, too, the time for removal must be a proper time; at some time during business hours, and not at night or some unusual time, nor upon a Sunday or national holiday, like the Fourth of July, or Christmas or New Year's day.

§ 577. — **Contract—Usage—Course of dealing.**—The necessity of giving notice of the arrival of the goods may be dispensed with by contract. When this is done the consignee or owner must wait for the arrival of the ship so that he can receive the goods from her port. But it is said that if in such case the master is guilty of gross negligence and exposes the goods to peril, he would still be liable. Such contracts, too, will be strictly construed against the carrier.<sup>26</sup> "It is a pervading rule of the maritime law that the master of a vessel intrusted as carrier with the custody of the property of a distant owner is bound to exercise reasonable care of the goods until delivery pursuant to the contract. This duty of reasonable care for the preservation of

<sup>25</sup> Green, etc. Nav. Co. v. Marshall, 48 Ind. 596; Robinson v. Chittendon, 14 N. Y. Super. 133.

<sup>26</sup> The Boskenna Bay, 22 Fed. 662; Hutch. on Car., § 366a.

the property from loss arises in all situations and in all emergencies. It is in accordance with this general obligation that, in the absence of any special stipulations in the bill of lading, if a cargo be duly landed, on notice to the consignee at the port of destination, and the consignee fails to appear or refuses to take the goods, the master cannot abandon them, but is responsible for reasonable care of the goods, and must either hold them as bailee or store them on the shipper's account. Where the stipulations of the bill of lading require the consignee to be present and receive the goods as soon as the vessel is ready to unload, and that they shall be at the consignee's risk as soon as landed on the dock, and the consignee is duly notified, and attends in order to accept the goods as landed, and takes more or less charge of them, the stipulation is held to exempt the ship from subsequent loss or damage. In such cases, as the consignee has due notice of discharge, and accepts the goods, the duty of protecting the property is cast by the contract upon him, and the ship is relieved. . . . As respects all such stipulations inserted by the carrier for his exemption from liability, the ordinary rule is that they are to be strictly construed. They are not to be extended by implication beyond the fair import or necessary meaning of their terms. Still less do they exempt from negligence or from the duty of ordinary care imposed by law upon the carrier, unless that be expressly stated, or unless the stipulations can otherwise have no effect at all. Thus, a general provision that goods shall be carried at the 'owner's risk' does not excuse the carrier from the duty of ordinary care. It is well settled in the federal courts that all stipulations, indirect as well as direct, inserted by the carrier for exemption from loss by his own negligence, are void." <sup>27</sup>

§ 578. — Usage—Course of dealing.—If there be a usage well understood and acted upon by the carrier and the consignee to an extent that it may be said that with the parties interested it has come to be a usual course of business to receive the goods at the dock on the arrival of the ship without notice, no doubt such usage and course of business would excuse the carrier. As, for example, where the consignee has his place of business near the dock or landing of the vessel, and has been in the habit of receiving his freight there at her dock for a long time, so that it

<sup>27</sup> *Dixon v. The Surrey*, 26 Fed. 791.

may be said that it has become to be a long continued course of business. In such case the requirement that the carrier should give him notice would be waived. And where it appeared that it had been the long continued practice of a manufacturing company to ship its goods daily by a regular line of steamboats consigned to its agent for sale, and it had been part of the regular routine of business of the agent, without notice, to call for and receive the goods upon their arrival each day at the carrier's wharf at the place of destination, and to remove them, a specific notice from the carrier of the arrival of each parcel is not necessary. The duty of the carrier, as such, is performed when the goods are landed at the accustomed place and the consignee has had a reasonable time to remove them. But if the goods are received upon a holiday, and it has been the usage for the consignee not to receive goods upon those days, he is entitled to a reasonable time after that day to remove them.<sup>28</sup>

§ 579. **Consignee cannot prolong liability as carrier.**—The consignee cannot prolong the liability of the common carrier by inattention to the notice that his goods have arrived and await delivery. It is his duty to at once attend to the matter and, at least in a reasonable time, call for the goods, pay the charges and take them away; or if there are reasons why he should not do so, inform the carrier of the reason. And where the car containing the goods arrived at the carrier's station, and the consignee received notice of the arrival of the goods the following morning about nine o'clock, and at ten o'clock sent a truck for a load of the goods, which were unloaded at consignee's place of business about three o'clock in the afternoon, the evidence showing that he might have taken away two more loads before the hour of closing with one truck, the court in its opinion said: "The plaintiffs seek to hold the defendant to a strict liability as insurer of the goods. Asking that so rigid a rule be applied to the defendant, it is just that the plaintiffs in turn be held to prompt and diligent action. A consignee cannot, after he has notice of the arrival for him of property, defer taking it away while he attends to his other affairs. He may not thus prolong the time during which the carrier shall remain liable as an insurer. That would be to make the carrier a mere convenience for the consignee, without consideration of any kind to the carrier, and yet resting under a great risk. So much

<sup>28</sup> Russell Mfg. Co. v. N. H. S. Co., 50 N. Y. 121.

time as the consignee after notice gives to his other business, to the neglect of taking charge of his property and removing it from the custody of the carrier, cannot be allowed to him in estimating what is a reasonable time for him in which, after notice of arrival, to take delivery of his goods. He is not to be compelled to leave all other business to take his goods from the hands of the carrier. He may attend first to whatsoever demand of his business he deems the most urgent or the most profitable; but he cannot do this at the hazard and expense of the carrier. It is the duty of the carrier to give notice of arrival; it is the duty of the consignee at once, and with diligence, to act upon this notice and to seek delivery, and to continue until delivery is complete. Either may neglect this his duty; but then the consequence of neglect must be borne by him.”<sup>20</sup>

#### CARRIERS BY RAILROAD.

§ 580. **Termination of liability.**—The same rigid rule applies to common carriers by railroad that applies to all others. They are bound to deliver the freight to the consignee, or the person lawfully entitled to receive it, and will not be excused for misdelivery. “There must be an actual delivery to the proper person.” But the railroad company, like the carrier by water, is not bound to deliver the goods personally to the consignee as is the express company, for reasons which we have before stated. The question that has elicited a great deal of interest in this country, and one as to which the authorities are not in harmony, is, what must the railroad carrier do upon the arrival of the freight at its destination in order to terminate its liability as a common carrier? Under what circumstances can it cease to be an insurer and become simply a warehouseman of whom the consignee or owner can require only ordinary diligence and hold it only for ordinary negligence?

§ 581. **Three distinct views.**—Upon this question there are in this country three distinct holdings, each giving strong reasons for their opinions and each supported by the strongest jurists of our courts. (1) The first, led by the Massachusetts court, holds “that when the transit is ended, and the carrier has placed his goods in the warehouse to await delivery to the consignee, his

<sup>20</sup> *Hedges et al. v. H. R. R. Co.*, 49 N. Y. 223, 226.



liability as carrier is ended also, and he is responsible as warehouseman only."<sup>30</sup>

(2) The second class, led by the New Hampshire court, holds "that merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business."<sup>31</sup>

(3) The third class holds that the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time in the common course of business to take them away after such notification.<sup>32</sup>

§ 582. (1) **The Massachusetts rule.**—Some of the ablest courts of the Union support this rule, and their opinions are learned and interesting. In Massachusetts the court thoroughly discuss the doctrine in the case of *Norway Plains Co. v. Boston*,

<sup>30</sup> *Thomas v. Boston R. Co.*, 10 Met. 472, 43 Am. Dec. 444; *Norway Plains Co. v. Boston, etc. R. Co.*, 1 Gray, 263, 61 Am. Dec. 423; *Rice v. Boston R. Corp.*, 98 Mass. 212, and numerous other decisions found in the state. See 100 Mass. 455, 145 Mass. 132, and others. Among some of the states following the Massachusetts rule, as it is called, may be mentioned *Illinois*: *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550; *Chicago, etc. Co. v. Jenkins*, 103 Ill. 599, and many others. *Indiana*: *Cincinnati, etc. R. Co. v. McCool*, 26 Ind. 140. *Iowa*: *Mohr v. Chicago, etc. R. Co.*, 40 Iowa, 579, and other cases. *Georgia*: *Ga. etc. R. Co. v. Thompson*, 86 Ga. 327, and cases cited. See also Georgia Code, sec. 2070. *Missouri*: *Gashweiler v. Wabash R. Co.*, 83 Mo. 112, and many other cases. *North Carolina*: *South Carolina*; *Pennsylvania*: *McCurty v. New York, etc. Co.*, 30 Pa. St. 447. *Tennessee*: *East Tenn., etc. R. Co. v. Kelly*, 91 Tenn. 669, and other cases.

<sup>31</sup> *Moses v. Boston & M. R. Co.*,

32 N. H. 523. This is perhaps the first case that took issue with the Massachusetts rule. As following this rule may be noted *Alabama*, *Vermont*, *Wisconsin*, *Kentucky*, *New Jersey*, *Louisiana* and *Kansas*.

<sup>32</sup> Holding to this doctrine are the courts of *New York*: *McDonald v. Western R. Co.*, 34 N. Y. 497. See Angell on Carriers, sec. 313. See also a long list of cases upon these several classes collected from New York and other states. 5 Am. & Eng. Ency. of Law (2d ed.), 266. *Michigan*: *McMillan v. Michigan Southern R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Buckley v. Great Western R. Co.*, 18 Mich. 121; *Feige v. Mich. Cent. R. Co.*, 62 Mich. 1; *Black v. Ashley*, 80 Mich. 90. *Minnesota*: *Kirk v. Chicago, etc. Co.*, 39 Minn. 161, and cases cited. *Nebraska*: *Burlington, etc. Co. v. Arms*, 13 Neb. 69. *Ohio*: *Lake Erie, etc. Co. v. Hatch*, 52 Ohio St. 408. *Texas* has a statute regulating liability. The *English* courts hold with the third class.

*etc. R. Co.*, above cited, and again it receives attention in the case of *Thomas v. Boston, etc. R. Corp.*, already cited. In the latter case, following the same theory and doctrine of the former, the court proceed upon the principle that the transportation and the storage of goods must depend upon contracts of very different character, and that although one person or company might render both services, yet the two contracts are different because the liabilities attending each are not the same. The court say: "The proprietors of a railroad transport merchandise over their road, receiving it at one depot, or place of deposit, and delivering it at another agreeably to the direction of the owner or consignor. But from the very nature and peculiar construction of the road the proprietors cannot deliver merchandise at the warehouse of the owner, when situated off the line of the road, as a common wagoner can do. . . . They can deliver it only at the terminus of the road, or at the given depot where goods can be safely unloaded and put in a place of safety. After such delivery at a depot the carriage is complete. But owing to the great amount of goods transported, and belonging to so many different persons, and in consequence of the different hours of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owner of the goods, that they should be unloaded and deposited in a safe place, protected from the weather and from exposure to thieves and pilferers; and where such suitable warehouses are provided, and the goods which are not called for on their arrival at the place of destination are unloaded and separated from the goods of other persons and stored safely in such warehouses or depots, the duty of the proprietors as common carriers is, in our judgment, terminated; they have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being present to receive them, have unloaded them and have put them in a safe and proper place for the consignee to take them away, and he can take them at any reasonable time. The liability of the common carrier being ended, the proprietors are by force of law depositaries of the goods and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care."

§ 583. (2) **The New Hampshire rule.**—The New Hampshire rule, or the second class, was very learnedly discussed in the

case of *Moses v. Boston, etc. R. Co.*, above cited. The courts holding to this doctrine proceed upon the theory that the consignee must have had notification from the consignor that the goods were shipped, and that it becomes his duty to take notice of the general course of business of the carrier; the time of departure and arrival of trains, and when the freight may be expected; holding that the consignee should be given a reasonable time after it has arrived in which to receive it from the carrier. These courts hold that even while the freight is being unloaded, and while it is in the hands of the common carrier, the same reasons exist for holding the common carrier to the extraordinary liability that existed during the time it was in transit. And in the case cited the court say: "But while it is in the process of unloading, and afterwards while awaiting removal, it must be protected from the weather and from depredation. Freight is brought over the road at all hours, by night as well as by day, and the trains must necessarily be more or less irregular in the hours of their arrival. It cannot be required of the consignee to attend at the precise moment when his goods arrive, to receive and take care of them, and the company cannot discharge themselves from responsibility by leaving them in an exposed condition in the open air. Until the goods have passed out of their custody and control into the hands of the proper person to receive them, they have a duty to perform in the preservation and protection of the property, even after their responsibility as common carrier is at an end." And again: "The same persons—the servants of the company—continue in the exclusive possession and control of the goods as when they were on their transit, and they are equally shut up from the observation and oversight of all others. The consignee has had no opportunity to know that they have arrived, and in what condition, and is in no better situation to disprove the fact, or to question any account the servants of the company having them in charge may choose to give of what may happen to them after they are so removed from the cars, or what has happened prior thereto, than before. If purloined, destroyed or damaged by their fraud or neglect subsequently to their removal and before he can have had the opportunity to come for them, he is left to precisely the same proof as if the larceny or injury had occurred while they were actually *in transitu*."

§ 584. (3) **The rules demanding notice to consignee.**—But the reasoning of these courts does not seem to be satisfactory. Indeed, the very reasoning of the New Hampshire court and of those which follow that class of holdings would seem to be an argument in favor of the rule that justice and fair dealing demand that the consignee should have notice of the arrival of the goods, and of the readiness of the carrier to deliver them. And it would seem in these days, the carrying of goods over long distances, and the great increase in railroads and freightage, would determine the necessity of the rule that the consignee should receive notice of the arrival of the property. This rule is very ably discussed by Judge Cooley in *McMillan v. Mich. Cent. Ry. Co.*<sup>33</sup> In the course of the opinion the judge says: "The man who sends his goods by railroad, and who desires to receive them as soon as they reach their destination, has commonly no design to employ the railroad company in any other capacity than that of carrier. If any other relation than that is formed between them, it is one that the law forms upon considerations springing from the usages of business, and having reference to the due protection of the interests of both. The owner wants storage only until he can have time to remove the goods; and the warehousing is only incidental to the carrying. Payment for the transportation is payment also for the incidental storage. The owner has been willing to trust to the company as carriers, because the law makes them insurers; but he might not be willing to trust them as warehousemen under a liability so greatly qualified, and in a trust which implies generally a considerable degree of personal confidence."

§ 585. **What will excuse delivery.**—The carrier will, of course, be excused from delivering the goods when they have been lost in transit by reason of the happening of an event which excuses the carrier from liability; as where the loss was occasioned by the act of God, the public enemy, or as the result of the act of the shipper, the inherent nature of the goods, or from public authority. These have all been fully discussed. The carrier will also be excused when the goods have been stopped in transit by the vendor exercising his legal right to do so, and claiming the goods.

§ 586. **Stoppage in transitu.**—Stopping the goods in transit is a privilege given to the vendor under certain circumstances,

<sup>33</sup> 16 Mich. 79.

and in some ways is similar to the vendor's lien. Indeed, it has been said that it is nothing more than an extension of the vendor's common-law lien upon goods for his price, and has no effect of itself upon the contract.<sup>34</sup> It is a right peculiarly for the protection of the vendor of the goods. Where the vendor has sold goods to a vendee and has put them into the hands of the carrier for delivery to the buyer, and then discovers that the buyer is insolvent, he may repossess himself of the goods, and for this purpose may stop their transit in the hands of the carrier at any time before they are delivered to the buyer.

§ 587. **The law favors the right.**—Stoppage of the goods in transit is favored by the law because it is just. It is grounded upon the plain reasons of justice and equity that one man's property shall not be applied to the payment of another man's debts. "The right itself is regarded as an extension merely of the lien for the price which the seller of the goods has on them while remaining in his possession; which lien the courts will not permit to be superseded before the vendee, who has become insolvent, obtains possession, unless in the meantime the goods have been sold to a person who in good faith has paid value for them, and so would be a loser by his purchase if that were held invalid."<sup>35</sup>

§ 588. **Some requisites to the right to exercise stoppage in transitu.**—Two conditions must exist in order to give the vendor the right to exercise the privilege of stopping the goods in transit: (1) The goods must have been sold on credit; and (2) the buyer must be insolvent, and the insolvency not known to the seller at the time of selling the goods.

The right, however, is not defeated or destroyed by part payment of the purchase price, or by the acceptance of a bill of exchange or promissory note for a part of the price.<sup>36</sup> The insolvency of the buyer must exist at the time of exercising the right, and it is said it is immaterial that the insolvency existed at the time of the sale of the goods, provided the seller was ignorant of the fact.<sup>37</sup> If the vendor knew that the buyer was insolvent, he could not avail himself of the right; but if he did not know at the time, and after delivering the goods to the car-

<sup>34</sup> *Rowley v. Bigelow*, 12 Pick. 313; *Rogers v. Thomas*, 20 Conn. 53; *Atkins v. Colby*, 20 N. H. 154.

<sup>35</sup> *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17.

<sup>36</sup> *Feise et al. v. Wray*, 3 East, 93; 2 Addison on Contracts, 188.

<sup>37</sup> *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17.

rier for delivery to the buyer he discovers the fact, he can exercise the right and retake the goods.<sup>38</sup>

§ 589. **How exercised—Notice by whom—To whom.**—No formal manner of exercising the right is required; any notice, clear and unequivocal, to the carrier who has the goods in his possession and control to withhold the delivery of the goods to the buyer, stating his claim, and ordering that the goods be either held by the carrier to his own order or returned to him, may be sufficient.<sup>39</sup> The notice should be given by the vendor of the goods, or his agent, to the carrier who has the goods for transportation and before they are delivered to the buyer. The carrier has the right to know, indeed it is his duty to know, that the notice comes from one having authority, and for that purpose he may make inquiry and investigation, for he would have no right to withhold the delivery of the goods to the consignee upon a notice from one who did not have authority to give it, as from a stranger.<sup>40</sup> And where the consignor, after notice to the carrier to hold the goods shipped, unreasonably refused to furnish him with any evidence of the validity of his claim, it was held that such refusal might be construed as a waiver of his right.<sup>41</sup>

§ 590. **How can the right be defeated.**—The right cannot be exercised if the goods have been delivered to the buyer, or to his agent, before the carrier has notice to withhold them. The notice must come to the carrier while the goods are in his control. The carrier's responsibility, it will be seen, is to both the seller and the buyer, or those claiming under him. Should he fail to obey the notice of the seller when properly given, he may become

<sup>38</sup> *Farrell v. Richmond Ry. Co.*, 102 N. C. 390, 3 L. R. A. 647; *Benedict v. Schaettle*, 12 Ohio St. 515; *Reynolds v. Boston, etc. R. Co.*, 43 N. H. 583; *O'Brien v. Norris*, 16 Md. 122. When insolvency is known at the time of the sale. *Fenckhausen v. Fellows*, 20 Nev. 312; *Emerson v. Peteler*, 35 Minn. 481, 29 N. W. 312, 4 L. R. A. 732.

<sup>39</sup> *Allan v. Railway Co.*, 79 Me. 327; *Reynolds v. Railway Co.*, 43 N. H. 580; *Howe v. Stewart*, 40 Vt. 145; *Hutchinson, Car.* § 410.

<sup>40</sup> The vendor of goods notified an agent of the carrier that the

vendee had been attached; that the vendor desired to save the goods, and to deliver them to no one but the agent of the seller. It was held that the carrier, who afterwards delivered the goods to the vendee was liable to the vendor for conversion. *Jones v. Earle*, 37 Cal. 630, 99 Am. Dec. 388. A notice, although it does not contain reasons, is held good. *Allan v. Me. Cent. Ry. Co.*, 79 Me. 327, 9 Atl. 895.

<sup>41</sup> *Allan v. Maine Cent. Ry. Co.*, 79 Me. 327.

liable for the value of the goods; should he obey the notice without the legal right, the liability would be just as great for the assignee or the creditors of the buyer, and if not to these he might be liable to the buyer.

If the goods have come to the possession of the buyer, then they are out of the control of the carrier and the notice would be too late; they may have arrived at the place of delivery; but the question always is, are they still controlled by the carrier?

Where a quantity of logs was bargained for and sold to be delivered over a certain dam at the outlet of a lake, thence to be driven by a certain log-driving company to the purchaser's booms and mills, it was held that the right of stoppage *in transitu* remained in the seller until the logs came into the actual possession of the buyer at his boom, and the buyer having become insolvent in the meantime, although the logs had arrived at the place of delivery, the seller had the right to resume the possession of them.<sup>42</sup> And where the goods were not received by the buyer, but by mortgagees who were in possession of his store when the goods arrived, under a mortgage, and where, at the time of the delivery of the goods shipped to the buyer, "his store and stock were in the possession of an agent who represented several mortgagees whose mortgages were given after the goods were ordered, and under one of which a sale was made at about the date of such delivery, and the goods bid in by one of the mortgagees, who remained in possession, and from whom and the merchant, who was acting as agent for the mortgagee, a portion of the goods ordered were replevied by the vendor, who claimed the right to stop them in transit," it was held that this was not a delivery to the buyer, and if he was insolvent at the time of purchasing the goods, the vendor's rights were paramount to any acquired at the mortgage sale. The court say: "The mortgagees do not stand in the position of *bona fide* purchasers of the property; the right of stoppage could not be divested by a purchase of the goods under the

<sup>42</sup> *Johnson v. Eveleth*, 93 Me. 306, 48 L. R. A. 50; *Sheppard, etc. R. Co. v. Burrows*, 62 N. J. L. 469, 41 Atl. 695; *Neimeyer Lumber Co. v. Burlington, etc. R. Co.*, 54 Neb. 321, 74 N. W. 670. When the carrier takes possession from the seller as carrier, the transit

begins; when he divests himself of possession in such capacity to the buyer, the transit ends and the stoppage by the seller to be effective must occur between these two points. *Hall v. Diamond*, 63 N. H. 565; *Walch v. Blakely* 6 Mont. 194, 3 L. R. A. 648, note.

mortgage sale; the transit had not ended unless there was actual delivery to the buyer."<sup>43</sup>

An attachment against the buyer, or an execution levied before the actual delivery of the goods, will not defeat the right.<sup>44</sup> The buyer, being the consignee of the goods, has the right to take them from the carrier at any intermediate point between the shipping point and destination, and if he does so, his possession would defeat the right of the seller to stop the goods in transit. Whenever and wherever the goods come actually into the buyer's possession, then and there the right is defeated.<sup>45</sup>

So an assignment of the bill of lading to a *bona fide* purchaser who pays value for the goods will defeat the right.<sup>46</sup> But the transfer of the bill of lading as collateral security to a previous obligation, without any new consideration advanced, does not constitute such an assignment as will defeat the seller's right to stop the goods. Nothing short of a *bona fide* sale of the goods for value, or the possession of them by the vendee, can defeat the vendor's right of stoppage *in transitu*, and hence it has been held that an assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and consequently, takes it subject to the exercise of any right of stoppage *in transitu* which may exist against the assignor.<sup>47</sup>

A mere resale of the goods by the buyer, however, will not defeat the right of the first seller to stop the goods, for it would seem that such a sale would lack the element of delivery; nor would there be any evidence of the right to make delivery of the goods. But in case of an assignment of the bill of lading to a *bona fide* purchaser which stands for the goods, and may be delivered as the goods, the case assumes a very different phase; the former will not defeat the right, but the latter sale will. "There is no doubt, if the vendee makes a resale of the goods, he makes it subject to the vendor's right to stop the goods *in transitu*. But this is while the goods are going to the first vendee. After the

<sup>43</sup> Kingman v. Dennison, 84 Mich. 608, 11 L. R. A. 347.

<sup>44</sup> Farrell v. Richmond, etc. Ry. Co., 102 N. C. 390, 3 L. R. A. 647.

<sup>45</sup> Walch v. Blakely, 6 Mont. 194.

<sup>46</sup> Currie v. Roulstone, 2 Overt. (Tenn.) 110; Walter v. Ross, 2 Wash. (D. C.) 283; Loeb v. Peters,

63 Ala. 243, 35 Am. Rep. 17; Becker v. Hallgarden, 86 N. Y. 167; Lickbarrow v. Mason, 1 Smith's Ld. Cas. 388.

<sup>47</sup> Lesassier v. S. W. Co., 2 Wood, 35; Pattison v. Culton et al., 33 Ind. 240, 5 Am. Rep. 199; Harris et al. v. Pratt, 17 N. Y. 249.



first vendee has resold them and put them upon their second passage, the transit, between the vendor and his vendee, is at an end. But a resale will not defeat the vendor's right to stop the goods *in transitu* until they have reached their first destination, unless the bill of lading is assigned, or the vendee has anticipated the arrival and taken possession, which he may do, or the vendor consents to the resale."<sup>48</sup>

§ 591. **Lien of the carrier for freight has priority.**—The specific lien of the carrier for freight and storage is prior to the right of the vendor to repossess himself of the goods;<sup>49</sup> but it has been held that a clause in the bill of lading by which the carrier has a lien on goods shipped, for arrearage of freight and charges due from the owner or consignee on other goods, will not enable the carrier to hold the goods shipped on account of freight due from the vendee on preceding shipments, to the prejudice of the vendor's right of stoppage *in transitu*. That is to say, while the specific lien for freight and storage on the goods shipped will be given priority over the vendor's right to stoppage in transit, a general lien, though created by written contract, will not have priority, for it is but a claim of no greater dignity or importance than the claims of other creditors.<sup>50</sup>

<sup>48</sup> The language of the court in *Eaton et al. v. Cook*, 32 Vt. 61; *Pattison v. Culton*, 33 Ind. 240, 35 Am. Rep. 199. A sale for unpaid freight to the carrier will not defeat the right. *Wheeling, etc. R. Co. v. Coots*, 65 Ohio St. 551; *Mechem on Sales*, 1562; *Schmidt v. Steamship Pennsylvania*, 4 Fed. 548.

<sup>49</sup> *Pa. Steel Co. v. Georgia, etc. R. & B. Co.*, 94 Ga. 636; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84.

<sup>50</sup> *Farrell v. Richmond, etc. Co.*, 102 N. C. 390, 11 Am. St. Rep. 760, 3 L. R. A. 647; *Pa. R. Co. v. Am. Oil Works*, 126 Pa. St. 485. The court in *Farrell v. Railroad Co.* say: "The second defense rests upon the following clause of the bill of lading: 'The several carriers shall have a lien upon the

goods (shipped) for all arrearages of freight and charges due by the said owners or consignees on other goods.' The counsel for the defendant could give us no authority in support of this defense, and none, we think, can be found, to the effect that such a stipulation should be construed to take away this 'highly favored' and most important right of the vendor to preserve his lien, in order that his goods may 'not be applied to the payment of another man's debts', much less to those of his agent, to whom he delivered them for carriage. Shippers would hardly contemplate that in accepting such a bill of lading the well established and cherished right of stoppage *in transitu* was to be made dependent upon whether a distant consignee was indebted to

§ 592. **Stoppage in transitu—Duty of carrier—Termination of liability.**—So long as goods are in the control of the carrier, the notice of stoppage *in transitu* may be given, for during all this time the goods are considered to be in transit.<sup>51</sup> If the goods have been actually or constructively delivered to the vendee, so that the carrier can no longer control them, then the carrier's liability has terminated. But if the carrier has the possession and control of the goods, and the notice has been given, his duty becomes twofold: to the vendor to see that his rights are protected, to the buyer that he shall not be unlawfully treated. As we have seen, the right is based upon the insolvency of the buyer; if he is solvent, the seller has no right to stop the goods, nor has the carrier any right to withhold them from delivery. Under such circumstances if the carrier is in doubt he has the right and it is his duty to insist upon full investigation of all the facts, not only as to the question of insolvency, but any other fact that may go to the right of the seller to stop the goods, and he may retain the property in his possession until he is satisfied. Should he be unable to determine the facts, and both the vendor and vendee are demanding the goods and threatening to bring actions against him to recover them, the carrier would no doubt have the right to file a bill of interpleader in an equity court and compel the parties to settle the question between themselves. And when it has been so settled and he has delivered the goods in accordance with the decree of the court, his liability would terminate.

the carrier, and the commercial world would doubtless be surprised if it were understood that whenever such a stipulation was imposed upon consignors they were in effect yielding up their lien for the purchase-money and sub-

stantially pledging their goods for the payment of an existing indebtedness due their agent, the carrier, by a possible insolvent vendee."

<sup>51</sup> Hutchinson on Carriers, sec. 416.



## PART SIXTH

### CARRIERS OF PASSENGERS

#### CHAPTER I.

##### THE RELATION—WHO ARE PASSENGERS.

##### § 593 The relation.

##### WHO ARE PASSENGERS.

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§ 593. **The relation.**—There is an element that necessarily enters into the relation of carriers of passengers, very materially affecting both the duty and the liability of the carrier, that can in no way be an element in any of the relations thus far considered. It is the passenger's intelligence. In the carrying of inanimate freight the carrier is privileged to store it away as he may see fit, being careful to give it safe and proper carriage, but it is at all times entirely under his control. And so in the carriage of animate freight, as live stock, the carrier or his servants, of necessity, have control of the property; his liability, however, is modified, as we have seen, to the extent that the damage might be attributable to the inherent nature of the property or the life of the freight. But where the carrier is engaged in the carrying of passengers, the modification of his liability must necessarily be

very much greater, for the subject of the carriage has more than mere instinct; it has intelligence, judgment and discretion. And this judgment, intelligence and discretion must, of necessity, lessen the control and absolute supervision of the carrier, for the law necessarily requires that the passenger should exercise a reasonable intelligence, judgment and discretion in avoiding injury; he must use his faculties to shun danger; he must exercise at least ordinary care. And so it follows that the element which resulted in that rule of law, which has been so often mentioned, and which was demanded by public policy, that the liability of the common carrier of goods should be that insurer, does not exist in the carrying of passengers. The liability is very much lessened, and very greatly modified. He is not an insurer of the safety of the passenger, but is held to that high degree of diligence which the particular business, surrounded by its dangers and demands for skill and care, requires.

Chief Justice Marshall, in the early case of *Boyce v. Anderson*,<sup>1</sup> which was an action for the loss of certain slaves, in discussing this particular phase of the question said: "Can a sound distinction be taken between a human being in whose person another has an interest, and inanimate property? A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot safely be adopted unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers rather than by that which is applicable to the carriage of common goods."

As to the distinction between the liability of the carrier of passengers and the liability of the carrier of goods, it has been said: "The latter has neither the power of volition or motion and is completely under the carrier's control. The former is

<sup>1</sup> 2 Pet. (U. S.) 151.

operated upon by moral causes, the latter only by physical; and of necessity this distinction must be kept in view in the application of the rule.”<sup>2</sup>

#### WHO ARE PASSENGERS.

§ 594. **Definition.**—A passenger is one not a servant of the carrier who by the consent of the carrier, express or implied, is being transported in the vehicle of the carrier from place to place, or who is at a station of the carrier with the intention of at once, or as soon as possible, entering upon such relation. This definition can be said to comprise the general essentials, but it would be difficult to form a definition that would include every essential or circumstance that might in particular cases enter into the determination as to who are legally passengers. It is a status or relation that must be determined in each particular case.

§ 595. **The status fixed more or less by intention.**—One who is on board the train or vehicle of the carrier, and in the place usually furnished for the conveyance of passengers and is being conveyed, is legally presumed to be a passenger and to have complied with all the essentials necessary or legally required to constitute him a passenger, and should his relation as such be disputed, the burden of proof would be upon the carrier to show that he was not legally a passenger.<sup>3</sup> But one who enters the waiting-rooms or passenger-cars or coaches of the carrier without any intention of being transported is not a passenger, but a mere licensee, or a trespasser, depending upon the intention of the person and the privileges granted him. There must be an intention upon the part of the person to become a passenger to be conveyed to some place by the carrier, and it is this intention manifested in the direction of becoming a passenger that largely fixes his status.<sup>4</sup> While it is true that the relation is a con-

<sup>2</sup> Clark v. McDonnell, 4 McCord (N. C.) 223; 1 Fetter, Carriers of Passengers, sec. 2; Hutchinson on Carriers, sec. 495.

<sup>3</sup> Iseman v. South Carolina, etc. Co., 53 S. C. 566. See *post*, § 640 and notes.

<sup>4</sup> Where one had boarded a car by mistake and learning it was

the wrong one attempted to leave it and was injured. The court said upon the undisputed facts the plaintiff had not been accepted by the defendant as a passenger at the time of the accident and had himself abandoned the intention of becoming one. . . . The judge therefore properly in-

tractual relation, it is not necessary that the contract for carriage should be an express contract. It may be implied, and often is, from slight circumstances. The consent of the carrier is presumed from the fact that it is his legal duty to carry all persons who apply, with certain exceptions; and so it has been held that the contract need not be consummated by the payment of fare, or even by entering the vehicle of the carrier, but may depend largely upon the intention of the person at the time he enters the depot or the waiting-room, or the car, or the boat, or the vehicle of the carriage.<sup>5</sup>

**§ 596. Not essential that the person should be in the vehicle of the carrier.**—One may become a passenger and entitled to all the privileges and right to be protected as such, even before entering the vehicle of the carrier, provided, of course, he has the intention of being transported without delay by the carrier. He becomes a passenger often while waiting at the station or waiting-room of the carrier for transportation. A person who goes into the station of the carrier with the *bona fide* intention of becoming a passenger is entitled to the privileges and the rights of a passenger, at least so far as the safety of his person from abuse or assault or defects in the station, platforms, etc., is concerned.<sup>6</sup> And where one was “injured by the slipping of a gang-plank while attempting to cross it when entering a steamer to take passage, he was regarded as a passenger.”<sup>7</sup> The court says: “It cannot be questioned that a person may become a pas-

structed the jury that the defendant was bound to exercise ordinary care only. *Robertson v. Boston, etc. Ry. Co.*, 190 Mass. 108, 76 N. E. 513, 3 L. R. A. (N. S.) 588; where a number of cases are cited which take a different view.

Where plaintiff entered a ferry office intending to buy a ticket, held not to be a passenger. *Vandegrift v. West Jersey, etc. Co.*, 71 N. J. L. 637, 60 A. 184. See editorial notes, 104 Am. St. Rep. 585-9. Where one enters a railroad station intending to become a passenger on a train soon to arrive, and purchases a ticket he

becomes a passenger and the carrier must exercise reasonable care in protecting him as such. *Atchison, etc. R. Co. v. Holloway*, 71 Kan. 1. One waiting on platform built by a street car company for passengers, held a passenger. *Spencer v. St. Louis Transit Co.*, 111 Mo. App. 653, 86 S. W. 593.

<sup>5</sup> *North Chicago Street Co. v. Williams*, 140 Ill. 275, 52 Am. & Eng. R. Cases, 522.

<sup>6</sup> *Gordan v. Grand St. etc. R. Co.*, 40 Barb. 546; 2 Wood's Railway Law, 1037, 1045. See cases cited *ante*, § 595.

<sup>7</sup> *Rogers v. Kennebec S. Co.*, 86 Me. 261, 25 L. R. A. 491.

senger before the transportation has actually commenced, and before he has entered the carrier's vehicle. In the familiar case of *Brien v. Bennett*,<sup>8</sup> the defendant's omnibus was passing on its journey and the plaintiff made a signal for the driver to stop and take him up. The omnibus was accordingly stopped for that purpose and the door opened, but just as the plaintiff was putting his foot on the step the omnibus was driven along and the plaintiff was thrown upon his face and injured. It was held that the stopping of the omnibus at the plaintiff's request implied a consent to take him as a passenger, and that thereupon in attempting to enter the carriage he had the rights of a passenger. In *Shannon v. Boston, etc. Co.*,<sup>9</sup> a person waiting in the station for a passage on a train soon to depart was invited by the ticket agent to sit in an empty car standing on the side track while the waiting-room was being cleaned. It was held that she was entitled to the same protection from the company while in this car as if in the regular waiting-room. In either place the person is a passenger in the care of the company."<sup>10</sup> And where a person had purchased a ticket at the station or depot of defendant company, intending to be a passenger on the cars of the company, and while attending to the checking of her baggage was injured by being knocked down by persons engaged in scuffling in one of the passage-ways of defendant's station, it was held that the relation of common carrier and passenger was established, and the company was required to exercise reasonable care to protect the passenger from injury in the use of the station or depot for the purposes of the journey. And if the passenger uses the usual ways and passages for the purpose of obtaining checks for baggage, and is injured by any dangers existing in or on such ways and passages which are known, or ought to be known, to the servants of the company having charge of such station or depot, or which could have been reasonably anticipated by them, and reasonable care has not been exercised to protect the passenger from such dangers, liability exists on the part of the defendant company to respond in damages for such injuries. The court say: "A railroad company is a common carrier, and owes to its passengers the duty of guarding them from assaults and

<sup>8</sup> 8 Car. & P. 724.

<sup>9</sup> 78 Me. 52.

<sup>10</sup> *Smith v. St. Paul, etc. R. Co.*,  
32 Minn. 1, 50 Am. Rep. 550;

*Warren v. Fitchburg R. Co.*, 8  
Allen, 227, 85 Am. Dec. 700; *Cas-*  
*well v. Boston, etc. R. Co.*, 98  
Mass. 194, 93 Am. Dec. 151.



insults from their fellow-passengers and strangers when from a high degree of care the same might have been prevented.<sup>11</sup> This duty grows out of and is impliedly a part of the contract between the carrier and the passenger. According to the uniform tendency of adjudications, which we admit as authorities, the carrier owes to the passenger the duty of protecting him from violence, insults and assaults of his fellow-passengers or intruders, and will be held responsible for its own or its servants' neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and while not required to furnish watchmen or servants sufficient to overcome all force or negligence when unexpectedly happening, yet it is their duty to provide reasonable precautions to protect the passenger from assaults from any quarter at which they might reasonably be expected to occur under the circumstances of the case and the conditions of the parties."<sup>12</sup>

And where a person had purchased a ticket at the ticket office of the carrier, with the intention of becoming a passenger on one of its trains, and had passed through the turnstile provided by the company for that purpose, and onto its depot platform, it was held that the relation of carrier and passenger existed between the parties when the purchaser of the ticket had passed through the turnstile.<sup>13</sup>

§ 597. **Express messengers and mail agents.**—Express messengers are not servants of the carrier company, but are, as a general rule, the servants of the express company which contracts with the railroad company to carry its goods over their line; but in some cases the railroad company has an express business of its own, in which case the express messenger would be the servant of the company and not a passenger. Express messengers, as a general rule, are passengers and entitled to the privileges of

<sup>11</sup> Putnam v. Railroad Co., 55 N. Y. 108; Hendricks v. Railroad Co., 44 N. Y. Super. Ct. 8.

<sup>12</sup> Exton v. Central R. Co., 62 N. J. Law, 7, 42 Atl. 486, affirmed 63 N. J. Law, 356.

<sup>13</sup> Ill. Cent. R. Co. v. Treat, 75 Ill. App. 327. In Chicago & Grand Trunk R. Co. v. Stewart, 77 Ill. App. 66, it was held that "so long as a person merely proposing to

be carried is at liberty to change his mind, he is not a passenger and for an injury which he might sustain through the negligence of the carrier he must seek redress as a stranger." This would hardly seem to be supported by authorities to the full extent of the statement.

See notes and cases cited, *post*, § 629.

passengers, but in some cases the express companies stipulate in their contract with the railroad or carrier company that they shall be exempted from liability, and with such an exemption so stipulated, and understood by the messenger who takes the employment, accepting it with full knowledge of the stipulation, it has been held that the express messenger is not a passenger upon the carrier company's trains.<sup>14</sup> But where the express messenger has no knowledge of the stipulation limiting liability, and does not himself agree to such a limitation, he will not be deprived of his rights as a passenger and will be entitled to protection against the negligence of the railroad company or its servants. And, as a general rule, it may be stated that where there is no such limitation by contract, express or implied, an express messenger carried on a railroad train in the exercise of his business under a contract between a railroad company and an express company is a passenger, and, so far as consistent with his duties, is entitled to protection as such.

In *Brewer v. N. Y. etc. R. Co.*,<sup>15</sup> the court, in considering the

<sup>14</sup> In *Baltimore & Ohio R. Co. v. Voight*, 176 U. S. 498, it was held that an express messenger occupying an express car, in charge of express matter, in pursuance of a contract between the railroad company and the express company, is not a passenger within the meaning of the rule of public policy which denies the validity of contracts limiting the liability of the carrier to a passenger for negligence, and cannot recover of the railroad company for injuries sustained in a collision, where the contract between the companies exempts the railroad company from such liability, while their own contract, voluntarily entered into as a condition of employment, assumes all such risks, and stipulates that he will indemnify and hold his employer harmless from all liability for such accident or injury. In *Blair v. Railroad Co.*, 66 N. Y. 313, 23 Am. Rep. 55, it was held:

"Where there is no express exemption provided by contract, a railroad company is liable for the consequences of its own or its servants' negligence to persons traveling upon its trains as messengers or agents of an express company to the same extent as to other passengers, although no charge is made for their fare." *Knowlton v. Erie, etc. Co.* 19 Ohio St. 266, 20 Am. Rep. 395. But where the plaintiff was taken into the express car by the express messenger to teach him the business without authority of the company, the conductor supposing him to be an agent of the company, it was held that he was not a passenger. *Union Pacific R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475.

Express messenger a passenger. *Davis v. Chesapeake, etc. R. Co.*, 119 Ky. 641, 92 S. W. 339, 5 L. R. A. (N. S.) 458.

<sup>15</sup> 124 N. Y. 59, 11 L. R. A. 483.

question under discussion, say: "When he," meaning the express messenger, "entered into the service of the express company he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption or implied understanding that the messenger took upon himself the risks of injury he might suffer from the negligence or fault of the defendant; he was in no sense the employee of the defendant, nor could he, without his consent, be subjected to the responsibilities of that relation. He was lawfully in the car, having charge of *the property and business there* of the express company, under its employment, and although he paid no fare to the defendant, was carried by virtue of no contract made by him personally with the latter, and must have understood that he was there pursuant to some arrangement of his employer with the defendant, he was not necessarily by that fact chargeable with notice of the provisions in question of the contract. Presumptively he was entitled to protection against personal injury by the negligence of the defendant."<sup>16</sup>

The test seems to be, Was the person injured lawfully upon the train of the carrier company under a contract, express or implied, that does not make him an employee or servant of the company? And so it has been held that persons who are engaged in business for their own profit and advantage on the carrier's conveyance, with the consent of the carrier, are passengers, and entitled to protection as such from the carrier. And where the plaintiff was keeping bar upon the steamboat of defendants under an agreement by which he was to pay them \$200 per month for the privilege and use of the bar, and was also acting as agent for an express company, such company paying defendants a monthly rate for carrying packages and messengers over the route, defendants' route consisting partly of a passage by steamboat and partly of a passage by railway, and plaintiff was injured by defendant's railway engine when on his way to take charge of the bar and the express matter, it was held that the plaintiff sustained the relation of passenger to defendants, and not the relation of employee, the court holding that even as bar-

<sup>16</sup> Mo. Pac. R. Co. v. Ivey, 71 Tex. 409; Blair v. Erie R. Co., 66 N. Y. 313; Nolton v. Western R. Corp. 15 N. Y. 444; Smith v.

N. Y. Cent. R. Co., 24 N. Y. 222; Collett v. London & N. W. R. Co., 16 Q. B. 984.

keeper plaintiff was in no sense an employee of defendants.<sup>17</sup> Therefore news-agents, traveling upon the trains of the company to supply passengers with news and paying to the company a stipulated sum, are passengers and not employees. Where "a railroad corporation, in consideration of the payment to them by a person of a certain sum of money per year in quarterly instalments and his agreement to supply the passengers on one of their trains with iced water, issued season tickets to him quarterly for his passage on any of their regular trains, and permitted him to sell popped corn on all their trains, it was held that his relation to them, while traveling upon the road under this contract, was that of a passenger and not of a servant." The court say: "Like other season-ticket holders he paid the defendants for the privilege of passing and repassing regularly over the road, and was at liberty to go or not, as he pleased. It appears to us that the service which he rendered in furnishing water to passengers was intended as a compensation for some increase in his privileges. The fact remains that he was traveling on his own business and not on that of the defendants."<sup>18</sup> But where the newsboy was upon the train by connivance of the conductor, and without the consent or by contract with the carrier, it was held that he did not sustain the relation of a passenger.<sup>19</sup> The same rule, however, would not apply as to street-car companies. In their case the newsboy is on and off the car as he sees fit; he is not considered as a passenger, and is at most a licensee.<sup>20</sup>

§ 598. *Mail agents are passengers.*—There seems to be no question but that the mail agents of the United States traveling upon railroad trains in charge of mail cars and the United States mail are passengers and entitled to all the protection due to passengers upon the trains of the company; and the courts have gone so far as to hold that this is true even though a mail agent is traveling upon a pass containing a limitation or exemption from liability for damages on account of injuries occurring through the negligence of the company. It of course rests upon that principle which we have already stated, that, where a person

<sup>17</sup> *Yeomans v. Navigation Co.*,  
44 Cal. 71.

<sup>18</sup> *Com. v. Vermont, etc. R. Co.*,  
108 Mass. 7, 11 Am. Rep. 301.

<sup>19</sup> *Duff v. Railroad Co.*, 91 Pa.  
St. 458, 36 Am. Rep. 675.

<sup>20</sup> *Philadelphia Traction Co. v.*  
*Orbann*, 119 Pa. St. 37, 12 Atl.  
816; *North Chicago Street Car*  
*Co. v. Thurston*, 43 Ill. App. 587;  
*Blackmore v. Railroad Co.*, 38 N.  
S. Q. B. 172.

is traveling under a contract which does not make him an employee or servant of the company, he will be entitled to that care and diligence which is due to one who is strictly a passenger.

In *Seybolt v. New York R. Co.*,<sup>21</sup> where "a mail agent was killed by an accident on defendant's railroad while riding upon a pass issued for his use by defendant, upon which was an indorsement by which it was stipulated that the defendant should be exempt from liability for damages on account of injuries occurring through its negligence," it was held that the stipulation exempting the defendant from liability was "unauthorized and void," and that although "the decedent received the pass, and was chargeable with the knowledge of its contents, it did not constitute a contract between him and defendant;" that the defendant was under "the absolute duty of carrying the agent in charge of the mails and had no right to impose the condition. Therefore, if the exemption clause was to be considered as a contract, it was void for want of consideration."<sup>22</sup>

<sup>21</sup> 95 N. Y. 562, 49 Am. Rep. 75; Gulf, etc. R. Co. v. Wilson, 79 Tex. 371; Libby v. Railroad Co., 85 Me. 34. It is not denied that the defendant company owed the same degree of care to this plaintiff (the mail agent) while riding in the passenger car in charge of the mails that it did the passenger upon the train. *Baltimore & Ohio R. Co. v. State*, 72 Md. 36, 6 L. R. A. 706, 18 Atl. 1107; *Norfolk, etc. R. Co. v. Shott*, 92 Va. 34; *Gleason v. Railroad Co.*, 140 U. S. 435; Gulf, etc. R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486; *Cleveland, etc. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 16 L. R. A. 339; *Brewer v. N. Y., etc. R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 433.

<sup>22</sup> In *Cleveland, etc. R. Co. v. Ketcham*, 133 Ind. 346, 19 L. R. A. 339, it was held that "a railway postal clerk in the employment of the United States, who

is entitled to ride free while on duty, or when traveling to and from duty, is a passenger entitled to the same care and protection as other passengers while returning home from duty, although he is in the postal car assisting in handling the mail by request of the clerk in charge and has not paid or offered to pay fare, or exhibited his commission as postal clerk, or notified the conductor of his presence on the train, and the conductor has not learned that he is on the train." And in *Ohio, etc. R. Co. v. Voight*, 122 Ind. 288, it was held that "the railroad company is *prima facie* liable for negligence in causing the death of a postal agent in charge of the mails on its trains where the mail car was derailed." *Gleason v. Va. etc. R. Co.*, 140 U. S. 435; see notes to this case 38 L. Ed. 458; *Houston, etc. R. Co. v. Hampton*, 64 Tex. 427; *McGoffin v. Mo. Pac. R. Co.*, 102 Mo. 540.

§ 599. **Drovers.**—Persons in charge of live stock being shipped over the carrier's road, and riding upon a free pass issued by the railroad company on account of the shipment of the stock, are passengers. In *Cleveland, etc. R. Co. v. Curran*,<sup>28</sup> the company "in making a contract for shipment of live stock at a specified rate, without any additional consideration, delivered to the shipper a drover's pass entitling him to go with his stock and to return on a passenger train. In the written agreement for transporting the stock, the holder of the ticket was referred to as riding free to take charge of the stock. On the pass was an indorsement that it was a free ticket, and that the holder assumed all risk of accident, and agreed that the company should not be liable under any circumstances, whether of negligence by the company's agents or otherwise, for any injury to his person or property, and that he would not consider the company as common carriers, or liable as such." The court held "that the pass and the agreement for transporting the stock constituted together a single contract, and that the holder, both while going with his stock and returning, was not a gratuitous but a paying passenger. That the stipulation in the contract exempting the company from liability for negligence constituted no defense to an action brought by the shipper for personal injury caused by the negligence of the servants of the company in the management of its trains, such stipulation being against the policy of the law, and therefore void." The court in the opinion say: "It is true that common carriers are not insurers of the safety of passengers as they are of goods which they undertake to carry; but the principle of law which forbids their being allowed to exempt themselves from liability for the consequences of their negligence in respect to goods applies with still greater force in the case of passengers. The common law has a peculiar regard for human life; and for this reason exacts a greater degree of care in respect to it than

<sup>28</sup> 19 Ohio St. 1; *Lake Shore, etc. Ry. Co. v. Teeters* 166 Ind. 355, 77 N. E. 599, 5 L. R. A. (N. S.) 425; *Ill. Cent. R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210; *Chicago, etc. R. Co. v. Troyer*, 70 Neb. 287, 97 N. W. 308; *Spriggs Adm'r v. Rutland R. Co.*, 77 Vt. 347, 60 A. 143;

*Weaver v. Ann Arbor R. Co.*, 139 Mich. 590, 5 Am. & Eng. Ann. Cases, 764. Very many cases are cited in the opinion and numerous cases from different states are collected in the notes in 5 Am. & Eng. Ann. Cases, 768-9. Also cases upon the limiting of liability by contract in such cases.

in relation to any matter of mere property. Carriers of the class of the plaintiff in error are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care. In *Philadelphia & R. R. Co. v. Derby* <sup>24</sup> it was laid down that, 'when carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross.' "

§ 600. **Workmen and employees.**—It seems to be well settled that if an employee is traveling in accordance with his employment with the company he will be regarded as an employee. A pertinent question would be, Was he at the time of the injury on duty for the company as their servant or employee? If so, he is not a passenger but a servant, and is presumed to assume all the risks ordinarily incident to his employment, and should the injury result from the negligence of the servants of the carrier company, that other rule would obtain, that the company would not be liable for the injury of one of its servants caused by the negligence of his fellow-servants. So, where one was riding upon a train for the purpose of cleaning snow from the track and was injured by the overturning of the car in which he rode by reason of an unsuccessful attempt of the conductor to remove a snowbank from the track by means of the snow-plough alone aided by the momentum of the train, it was held "that a recovery by the plaintiff was precluded by the facts that such

<sup>24</sup> 14 How. 486; *Welch v. Pac. etc. R. Co.*, 10 Ohio St. 65; *Chicago, etc. R. Co. v. Winters*, 175 Ill. 293; *Maslin v. B. & O. Co.*, 14 W. Va. 180, 35 Am. Rep. 748; *Ohio, etc. Co. v. Selby*, 47 Ind.

471, 17 Am. Rep. 719; *Illinois Cent. R. Co. v. Beebe*, 69 Ill. App. 363; *Lawson v. Railway Co.*, 64 Wis. 447; *Lake Shore, etc. R. Co. v. Brown*, 123 Ill. 162.

overturning of his car was one of the perils of the business which he assumed, and that the conductor and others, whose negligence is alleged, were fellow-servants in the same employment.”<sup>25</sup>

A very common and ordinary example demonstrating this rule is found where persons are employed in loading and unloading gravel trains and riding back and forth from the gravel pits to the place of depositing the load; such persons are held to be in the employment of the carrier and are not passengers.<sup>26</sup> But the rule as to the liability for the injury of employees or workmen who are being transported to and from their work by the carrier company, riding upon a pass, or by consent of the conductor of trains, or persons having charge of the carrier's vehicles, is not so well settled. There seems to be some conflict among the cases upon this question. A large number of cases hold that such persons while being transported are to be considered as employees of the company, while others contend that they are entitled to be treated as passengers. An attempt is made to lay down a rule in which the carrier is to be held liable in such like cases by the court. In the case of *Hutchinson v. York, etc. R. Co.*,<sup>27</sup> the court, after holding that the carrier was not liable in the particular case because decedent was engaged in the discharge of his duties to the carrier, say: “It may, however, be proper with reference to this point to add that we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant where the servant injured was not, at the time of the injury, acting in the service of his master. In such a case a servant is substantially a stranger and entitled to all the privileges he would have had if he had not been a servant.” And it would seem that this rule would be a safe one to follow in this class of cases. Without question the employee is not a passenger while engaged in the duties of his employment, but when these duties have ceased and he is being transported by the carrier by reason of a contract which gives to the carrier compensation, or by consent of the carrier because of his relations to the person, and such transportation is not in accordance or along the duty of his employment, it would

<sup>25</sup> *Howland v. Milwaukee R. Co.*, 54 Wis. 226; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Ladd v. Railroad Co.*, 119 Mass. 412;

*Kumler v. Junction R. Co.*, 33 Ohio St. 150. *Post*, sec. 623, etc.

<sup>26</sup> *Ohio & M. R. Co. v. Tyndall*, 13 Ind. 366, 74 Am. Dec. 259.

<sup>27</sup> 6 Eng. Ry. & Canal Cas. 580.



seem that in such cases the employee would be a passenger. As was stated by the court in the case of *State v. Maryland R. Co.*,<sup>28</sup> in discussing the conflict of authorities upon this subject: "In whatever else they may differ, these cases all agree upon one principle, and that is this: if the plaintiff is not at the time of the accident engaged in the actual service of the company, or in some way connected with such service, the company is liable for the negligence of its employees; that because he works daily for the company and is styled its employee, the company is not exempt from liability for the negligence of its other servants at all times and under all circumstances; that the exemption depends upon the actual service within the scope of his employment."

So a brakeman on a train which ran daily except Sundays, who was employed and paid by the day, but was not paid on Sunday unless required for duty on that day, after his day's work was ended on Saturday evening by the permission of the conductor, was returning home to spend Sunday and was permitted to travel free, and while riding in a caboose car of a freight train of the company was killed by a collision with another train, caused by the negligence of the employees of the company, in an action for damages it was held that he was a passenger and entitled to all the privileges he would have had if he had not been an employee; that the fact that he was riding on the cars upon an employee's pass did not alter the case. And where an employee who was employed to work upon a bridge of a railroad company, where his contract entitled him to free transportation from his home to the place where his work was to be performed, and from that place back to his home at night when his work was over, was killed by a collision with another train caused by the negligence of defendant company, in an action against the company it was held that the employee was a passenger while riding upon the train to his home, and entitled to protection as such.<sup>29</sup>

<sup>28</sup> 63 Md. 433, 441; *Doyle v. Fitchburg, etc. R. Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844; *Whitney v. N. Y. etc. R. Co.*, 43 C. C. A. 19, 102 Fed. 850, 50 L. R. A. 615; *McNulty v. Pa. R. Co.*, 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376; *Louisville & N. R. Co. v. Weaver*, 108 Ky. 392, 56 S. W. 674, 50 L. R. A. 381; *Chattanooga,*

*etc. Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886. But see *Ianone v. N. Y. etc. R. Co.*, 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730.

<sup>29</sup> *McNulty v. Pa. R. Co.*, 182 Pa. St. 479, 38 L. R. A. 376; *Doyle v. Railroad Co.*, 162 Mass. 66; *McDaniels v. Railroad Co.*, 90 Ala. 64; *Tex. & Pac. R. Co. v.*

§ 601. **Carrier must receive the person as a passenger.**—While, as we have seen, there must be an intention on the part of the passenger to become a passenger upon the carrier's vehicle, there must also be an express or implied receiving of the person as a passenger by the carrier. There need, of course, be no formal receiving or accepting of a person as a passenger upon the train or vehicle, but there must be such circumstances as indicate that the passenger is received, and that the carrier expects and understands that persons occupying or taking advantage of the particular situation are passengers. For example, the carrier company holds out to the public that they will receive and carry all passengers who may apply to them, and to that end they furnish coaches, vehicles and cars at the *termini* of their routes, and thus invite the public to patronize them, and become passengers over their line, and persons who accept this invitation are presumably accepted by the carrier. There are, however, certain reciprocal duties incumbent upon the person who seeks to become a passenger and avail himself of the privileges and protection of a passenger; he must present himself for carriage at the place appointed by the carrier for receiving its patrons, and in the usual manner; he must occupy the usual place upon the carrier's vehicle, train or boat; that is, the place furnished for and usually occupied by passengers. This has been recognized by the courts, and it has been held that where one clandestinely obtains passage by hiding himself away in the carrier's boat, or occupies an unusual place on the carrier's train, he is not a passenger but a trespasser and not entitled to the protection due to a passenger. And where the holder of a free pass on a railroad gets on at the front platform of the baggage-car next to the tender when the train is in motion, and after it has left the depot, and then tries to open the baggage-car door, although he is there with the knowledge of the conductor that some one had boarded his train, such person is not a passenger. The court say in such case, "it was also necessary for the plaintiff to prove that the relation of passenger and carrier existed between the deceased and defendant. This relation, which was claimed to exist, is a contract relation. A railroad company

Smith, 67 Fed. 524, 31 L. R. A. 321. See notes to 31 L. R. A. 321, where the several cases are collected and stated. For full state-

ment of rule see *Transit Co. v. Venable*, 105 Tenn. 460, 51 L. R. A. 886, and cases cited.

holds itself out as ready to receive and carry, and is bound to receive and carry, all passengers who offer themselves as such at the places provided for taking passage on its trains, and who take such passage in the cars provided for passengers. When one so presents himself, the contract relation under which he acquires the rights of a passenger may be either express or implied from the circumstances. If a person goes upon cars provided by the railroad company for the transportation of passengers with the purpose of carriage as a passenger, with the consent, express or implied, of the railroad company, he is presumptively a passenger. Both parties must enter into and be bound by the contract. The passenger may do this by putting himself into the care of the railroad company, to be transported, and the company does it by expressly or impliedly receiving him and accepting him as a passenger. The acceptance of the passenger need not be direct or express, but there must be something from which it may be fairly implied. One does not become a passenger until he has put himself in charge of the carrier, and has been expressly or impliedly received as such by the carrier."\*

§ 602. **Persons violating reasonable regulations.**—Carriers of passengers may make reasonable regulations as to the conduct of their business, and persons violating such regulations by way of obtaining passage upon their trains or vehicles, as a general rule, will not be considered as passengers. As, for example, railroads generally do not permit persons to ride upon the engine, in express-cars, mail-cars, baggage-cars or in unusual places, or upon their freight trains, without their consent; and so, when persons violate these regulations and obtain passage without the consent of the carrier, they are not passengers;<sup>31</sup> nor

\* Ill. Cent. R. Co. v. O'Keefe, 168 Ill. 115, 39 L. R. A. 148; Bricker v. Philadelphia & R. Co., 132 Pa. St. 1; Webster v. Fitchburg R. Co., 161 Mass. 298, 24 L. R. A. 521; 4 Elliott, Railroads, sec. 1581.

<sup>31</sup> Thomas v. Railroad Co., 72 Mich. 355; Arnold v. Railroad Co., 83 Ill. 273; Hutch. on Carriers, 538a; Eaton v. Del., L. & W. R. Co., 57 N. Y. 382. Railroad companies have the right to

make a complete separation between their freight and passenger business. Where this is done, the conductor of a freight train has such general authority only as is incidental to the business of moving freight, and no power whatever as to the transportation of passengers; and notice of this limited authority will be implied from the nature and apparent division of the business. When a person not accepted as a passen-

are they even licensees, but are trespassers, and may be ejected. And where a person ran to catch the train as it was starting from the station, and was not seen by any of the trainmen, and, without negligence on their part, was injured while attempting to board the train while moving, it was held that he was not a passenger and the company was not liable.<sup>32</sup> Where a person wrongfully boards a freight train which is not used for carrying passengers and remains on it without the consent of the servants of the company in charge of the train, he cannot claim the right of a passenger; and if injured while thus being carried, the company is not liable unless the injury was caused by gross or wilful neglect by the servants of the company.<sup>33</sup>

As to whether one can be deemed a passenger who gets upon the company's trains without consent or permit depends somewhat upon the custom of the carrier as to carrying passengers upon such train, as well as upon their regulations forbidding the carriage of passengers. The fact that the conductor of a freight train had permitted persons to ride on two or three occasions and had collected fare would not be sufficient to show that

ger, and without the knowledge of the railroad company's employees, is in a car not provided for passengers, but exclusively devoted to the railway mail service, and with no right to remain there, the company is not liable for injuries received by him in a collision. *Bricker v. Railroad Co.*, 132 Pa. St. 1. In *Files v. Boston, etc. R. Co.*, 149 Mass. 204, it was held that "the person who attempts to get into the cab of a locomotive engine attached to a freight train on a railroad used exclusively for the transportation of freight, to ride for his own convenience by invitation of the conductor of the train, does not acquire the rights of a passenger and cannot recover for personal injuries occasioned to him by the starting of the engine, even if he has previously ridden thereon by a similar invitation, and has seen

others, including railroad employees, do so."

<sup>32</sup> *Jones v. Boston, etc. R. Co.*, 163 Mass. 245.

<sup>33</sup> *Louisville & N. R. R. Co. v. Moss*, 13 Ky. Law, 684. One who by the silent acquiescence of the conductor rode upon the engine held not a passenger. *Radley v. Columbia So. R. Co.*, 44 Or. 332, 1 Am. & Eng. Ann. Cases, 447; Ill. Cent. v. *O'Keefe*, 168 Ill. 115, 39 L. R. A. 148; *Missouri, etc. R. Co. v. Williams*, 91 Tex. 255, 42 S. W. Rep. 855. One riding on gravel train held not a passenger. *Keating v. Mich. Cent. R. Co.*, 97 Mich. 154; on a timber train, Ill. Cent. R. Co. v. *Meacham*, 91 Tenn. 428. But circumstances may change this as where company has been in the habit of carrying passengers though it has a rule against it. *Spence v. Chicago, etc. R. Co.*, 117 Iowa, 1.

the train was a passenger train. But a freight conductor's authority to carry passengers might be implied from a long course of business of the company in mingling its freight and passenger business, and so if for a long time it has been the rule and practice of the company to separate their freight and passenger business, and carry passengers only upon their passenger trains, this custom and practice would go very far toward determining the question as to whether one who had boarded such a train would be a passenger.<sup>84</sup> But where one is received upon a freight train, or is permitted to ride in an unusual place upon the passenger train or vehicle of the carrier by permission of those in charge, although he is violating the reasonable regulations of the company, and although he, by reason of the manner of boarding the train or the vehicle or continuing to ride in it, is a trespasser, nevertheless the carrier owes to such person, when discovered, a protection from injury to the extent at least of ordinary care. It is that care and protection which humanity would demand of the carrier.<sup>85</sup>

§ 603. **Prepayment of fare.**—Prepayment of fare is not a requisite to becoming a passenger. "It is universally agreed that the payment of the fare, or price of the carriage, is not necessary to give rise to the liability. The carrier may demand its prepayment, if he chooses to do so, but if he permits the passenger to take his seat or to enter his vehicle as a passenger, without such requirement, the obligation to pay will stand for the

<sup>84</sup> *Lucas v. Milwaukee R. Co.*, 33 Wis. 41; *Cleveland, etc. R. Co. v. Best*, 169 Ill. 301. Where "a person was riding upon a locomotive engine of a freight train by agreement with the fireman of such engine to shovel coal for the privilege of riding (such person being on such train without the knowledge or consent of the conductor in charge thereof), held, not a passenger, and that to constitute one a passenger of the carrier on whose trains such person is, it is essential that such person should be rightfully on such train, or should be thereon with the knowledge or consent of

the conductor." *Woolsey v. Chicago, etc. R. Co.*, 39 Neb. 798, 25 L. R. A. 79; *Louisville, etc. R. Co. v. Hailey*, 94 Tenn. 383, 27 L. R. A. 549; *McVeety v. St. Paul, etc. R. Co.*, 45 Minn. 268, 11 L. R. A. 174; *McNamara v. Great Northern, etc. R. Co.*, 61 Minn. 296; *Can. Pac. R. Co. v. Johnston*, Montreal Rep., 6 Q. B. 213; *Powers v. Boston, etc. R. Co.*, 153 Mass. 198.

<sup>85</sup> *Whitehead v. St. Louis, etc. Co.*, 99 Mo. 263, 6 L. R. A. 409; *Wagner v. Mo. Pac. R. Co.*, 97 Mo. 512, 3 L. R. A. 156; *Chicago, etc. R. Co. v. Frazer*, 55 Kan. 582.

actual payment, for the purpose of giving effect to the contract with all its obligations and duties. Taking his place in the carrier's conveyance, with the intention of being carried, creates an implied agreement upon the part of the passenger to pay when called upon, and puts him under a liability to the carrier, from which at once spring the reciprocal duty and responsibility of the carrier."<sup>36</sup>

§ 604. **Same subject—Fraud on carrier.**—But if the person who is seeking transportation undertakes to defraud the carrier and evade the payment of fare, he is not a passenger, nor even a licensee, but a trespasser. And where a passenger boards a train with the deliberate purpose not to pay his fare and adheres to that purpose, or being on the train, and having money with him with which he could pay his fare, falsely and fraudulently represents that he is without means to pay, and in this way, and by means of such false representations, induces the conductor to permit him to remain on the train without paying his fare, the relation of carrier and passenger and the obligations resulting from that relation are not established.<sup>37</sup>

§ 605. **Termination of the relation.**—The relation of passenger and carrier having been once established is not terminated when the passenger alights from the vehicle of the railway company, but continues while on the premises of the carrier company for a period of time reasonably necessary to enable him to leave the premises, and during this time he is entitled to the protection of the company's agents and servants, even from the assaults of third persons.<sup>38</sup> And so it is held that the relation of carrier and passenger exists when a passenger is obliged to alight from a car to go to another to be carried by the carrier to his destination.<sup>39</sup> And where a passenger on a railroad train "alighted by direction of the company, or by its implied invitation, at a place where in order to leave the premises of the company it was necessary to cross intervening tracks, it was held

<sup>36</sup> Hutchinson on Carriers, sec. 565; Cleveland, etc. R. Co. v. Best, 68 Ill. App. 532, 537; Chattanooga, etc. R. Co. v. Huggins, 89 Ga. 494, 503.

<sup>37</sup> Condran v. Chicago, etc. R. Co., 14 C. C. A. (U. S.) 506, 67 Fed. 522, citing Railroad Co. v.

Brooks, 81 Ill. 245; Railroad Co. v. Mehlsack, 131 Ill. 64; Way v. Railroad Co., 64 Iowa, 48, and other cases.

<sup>38</sup> Tex. & P. Ry. Co. v. Dick, 63 S. W. 895.

<sup>39</sup> Chicago & A. Ry. Co. v. Winters, 175 Ill. 293, 51 N. E. 901.

that he remained a passenger until he had crossed such tracks, provided he used the means of egress which the company had provided, or which were customarily used with the knowledge of the company and its consent;" and in such case that "there was an implied agreement that the trains of the company should not be so operated as to make the exit unnecessarily dangerous," provided such passenger exercised reasonable care and prudence in avoiding danger; that is, such care and prudence as under all the circumstances a reasonably prudent person would exercise.\*

§ 606. **Passengers on street-cars.**—In determining who are passengers upon the street-cars, we are to apply the same principles already mentioned so far as they are applicable. Street-car companies, unlike railroad companies, do not construct and maintain depots and waiting-rooms for their passengers, nor do they, except in cases of suburban lines, maintain ticket offices, but passengers are expected to board the cars from the street wherever they stop, and to pay their fare to the conductor or person in charge. Once on board the car and in the place for passengers with the intention of being carried, and complying with the reasonable regulations of the company, the person is presumed to be, and is, a passenger during the time he is thus being conveyed. And so where a news-boy boarded a street-car without signaling it to stop, for the purpose of selling papers,

\* *Chesapeake, etc. R. Co. v. King*, 99 Fed. 251, 40 C. C. A. 432, citing *Railway Co. v. Coggins*, 32 C. C. A. 1, 88 Fed. 455; *Railway Co. v. Lowell*, 151 U. S. 209; *Warner v. Railway Co.*, 168 U. S. 339; *Graven v. MacLeod*, 35 C. C. A. 47, 92 Fed. 846, and other cases; *Dodge v. Boston, etc. R. Co.*, 148 Mass. 207; *Young v. N. Y. etc. R. Co.*, 171 Mass. 33, 41 L. R. A. 193. The relation of passenger and carrier usually continues until the passenger has a reasonable opportunity to safely alight from the train at his destination at the place provided by the carrier for the discharge of passengers, and to leave the carrier's premises in the direction ordinarily taken. *Glen v. Lake E. & W. R. Co.*, 165 Ind. 659, 73 N. E. 861. Person

after getting off street car not a passenger. *Conroy v. Boston, etc. Co.*, 188 Mass. 411, 74 N. E. 672. But see *McDonald v. St. Louis, etc. Co.*, 108 Mo. App. 337, 83 S. W. 1001. Where a conductor assaulted one who was getting off his car, following him into the street, held, person assaulted was a passenger. *Flynn v. St. Louis Transit Co.*, 113 Mo. 185, 87 S. W. 560. Where one thrown to ground by starting of street car when undertaking to board it, having one foot on step, held a passenger. *Clark v. Durham, etc. Co.* 138 N. C. 77, 50 S. E. 518. And where one signaled street car and it slows up to receive him. *Lewis v. Houston, etc. Co.* (Tex. Civ. App.) 88 S. W. 489

and jumped off again, he was held not to be a passenger so as to charge the company with special care to avoid injuring him, and this though he intended to pay fare if the conductor asked him for it.<sup>41</sup> When a passenger alights from the car upon the street, the relation of passenger ceases, for he is not upon the premises of the company, nor is there any implied obligation or duty upon the part of the company to provide or maintain the place of alighting. "The street," say the supreme court of Massachusetts, "is in no sense a passenger station for the safety of which a street-railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway and terminates his relation and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk. When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon, or leave, a train have the relation and rights of passengers in leaving or approaching the car at a station. But one who steps from a street-railway car to the street is not upon the premises of the railway company, but upon a public place where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highways and not of a passenger."<sup>42</sup>

So where a passenger was injured after leaving the car, in attempting to pass behind it, by falling over a fender which had become disarranged without the knowledge of the company and was projecting from the rear of the car, it was held that she could not recover. The court say: "It is admitted that when the plaintiff left the car she ceased to be a passenger of the defendant. When she began to walk toward her house she was merely a traveler upon the highway. The respective rights and duties of the plaintiff and the defendant were not those of a passenger and a common carrier, but those of a pedestrian crossing a public street in which was a street-railway track then occu-

<sup>41</sup> *Raming v. Metropolitan St. Ry. Co.*, 157 Mo. 477; *Blackmere v. Railroad Co.*, 28 U. C. Q. B. 217; *Duff v. Railroad Co.*, 91 Pa. St. 458, 3 Am. Rep. 675.

<sup>42</sup> *Creamer v. West End Street Car Co.*, 156 Mass. 320, 16 L. R. A. 490; *Chattanooga Electric Ry. v. Boddy*, 105 Tenn. 666, 51 L. R. A. 885.



pied by a street-car, and of a street-railway corporation lawfully using the same street in its traffic.”<sup>43</sup>

§ 607. — **Reasonable regulations.**—And so a street-car company has the right to make and enforce reasonable regulations as touching the rights of persons boarding their cars or being conveyed as passengers. And the same rules and principles of law apply in this particular as apply to steam-railway companies.

§ 608. **Must occupy usual place provided by the company.**—The carrier company cannot be said to have received a person as a passenger who occupies an unusual place upon its vehicle; it has the right to require that persons shall ride in the places it provides if such places are reasonable and usual. And so where a boy hangs on the side of an electric car with his feet resting upon the boxing of the axle and rode there without offering to pay fare, it was held that he was not a passenger to whom the carrier owed a safe carriage and immunity from injury.<sup>44</sup> But where the car is overcrowded with passengers, and persons are compelled to occupy unusual places for carrying passengers upon the car, as the front platform or the rear platform, or to ride up the sides and steps, and their position is known to those in charge of the car, who collect fare from such persons as passengers they are beyond question passengers and entitled to all privileges and protection of passengers.<sup>45</sup>

<sup>43</sup> *Gargan v. West End Street Car Co.*, 176 Mass. 106, 49 L. R. A. 421; *Bigelow v. West End Street Car Co.*, 161 Mass. 393, 37 N. E. 367.

<sup>44</sup> *Udell v. St. Ry. Co.*, 152 Ind. 507, 52 N. E. 799. Where one had received a transfer from one line of a street railway company to its other line, and was proceeding from the sidewalk to her car, on the latter line, which was standing at the end of the route, when she was struck by a piece of the trolley, which broke from

being changed as usual at such point from one end of the car to the other, it was held that she was entitled to recover as a passenger for her injury in the absence of a showing that the company had used the highest degree of care. *Keater v. Scranton Tr. Co.*, 191 Pa. St. 102, 43 Atl. 86.

<sup>45</sup> *Archer v. Ft. Wayne, etc. Co.*, 87 Mich. 101; *Upham v. Detroit, etc. Co.*, 85 Mich. 12; *Noble v. Railway Co.*, 98 Mich. 249. See notes *ante*, § 602.

## CHAPTER II.

### WHO MUST THE CARRIER ACCEPT AND CARRY, AND CERTAIN DUTIES OF CARRIERS AND PASSENGERS.

#### § 609. *Quasi-public servants.*

- 610. Exceptions to the general rule.
- 611. — Carrier must protect passengers.
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#### CERTAIN DUTIES INCUMBENT UPON THE CARRIER.

- § 614. Implied obligation.
- 615. Vehicles, machinery, roadways, tracks, etc.
- 616. Stational facilities.
- 617. Duty in managing and running its trains or vehicles.
- 618. The duty of passengers.

§ 609. *Quasi-public servants.*—Common carriers of passengers like common carriers of goods are *quasi-public servants*, and so are bound to serve the public when their reasonable rules and regulations are complied with. They owe a duty to all alike to carry passengers, and must not show partiality to any person or class of persons. "At this day it would be superfluous to enter upon a discussion to support the doctrine so well settled, that common carriers are public agents, transacting their business under an obligation to observe equality towards every member of the community, to serve all persons alike, without giving any unjust or unreasonable advantages by way of facilities for the carriage or rates for transporting them."<sup>1</sup>

"A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all, and, therefore, to permit the common carrier to charge various prices according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community."<sup>2</sup>

Public policy would not permit the great franchises that are

<sup>1</sup> *Atwater v. Delaware, etc. R. Co.*, 48 N. J. L. 55, 57; 1 *Wood on Railways*, sec. 195. A leading case upon this subject is said to be *Messenger v. Pennsylvania*

*R. Co.*, 7 *Vroom. (N. J.)* 407, 8 *Vroom*, 531.

<sup>2</sup> *Messenger v. Pennsylvania R. Co.*, above cited.

granted to and operated by common carriers of the country to be used other than impartially and for the public, and so the same general rule exists that obtains in the case of innkeepers.

Common carriers are bound to receive all passengers who apply for carriage so long as they have convenient accommodations for their safe carriage, unless there is a sufficient legal excuse for refusing to do so.<sup>3</sup>

Professor Parsons in his work on Contracts<sup>4</sup> says: "It is his duty to receive all passengers who offer; to carry them the whole route; to demand no more than the usual and established compensation."

§ 610. **Exceptions to the general rule.**—But to this general rule there are exceptions. The right of persons to be transported is not unlimited, "but is subject," says Judge Story,<sup>5</sup> "to such reasonable regulations as the proprietors may prescribe for the due accommodation of passengers, and for the due arrangement of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests in the management of such boats as a common incident to their right of property."

§ 611. — **Carrier must protect passengers.**—The carrier of passengers is bound to protect them from violence and injuries not only from its own servants, but from strangers and co-passengers, and this liability is upon the carrier from the time a person becomes a passenger, or entitled to protection as such, until that relation ceases.<sup>6</sup> And so it will be seen that the

<sup>3</sup> *Bennett v. Dutton*, 10 N. H. 481, 486.

<sup>4</sup> 2 *Parsons, Contracts*, 225; *Wheeler v. San Francisco, etc. R. Co.*, 31 Cal. 46, 86 Am. Dec. 147. In *Toledo, etc. R. Co. v. Pence*, 68 Ill. 524, it was held that railroad companies are public highways only in the sense of being compelled to accept and carry all passengers to the extent of their liability. *Indianapolis, etc. R. Co. v. Renard*, 46 Ind. 293.

<sup>5</sup> *Jencks v. Coleman*, 2 Sumn. (U. S.) 222. In this case Daniel Webster was of counsel and Charles Sumner was the reporter

of the court. *Cook v. Gourdin*, 2 Nott & McCord (S. C.), 22; *Markham v. Brown*, 8 N. H. 523; *Pearson v. Duane*, 4 Wall. (U. S.) 605; *McKee v. Owen*, 15 Mich. 115. "A common carrier of passengers may establish on his car or vessel an agency for the delivery of passengers' baggage, and may exclude all other persons from entering upon it for the purpose of soliciting or receiving orders from persons in competition with such agency." *Barney v. O., B. & H. S. S. Co.*, 67 N. Y. 301.

<sup>6</sup> *Exton v. Cent. R. Co.*, 63 N. J.

carrier must protect the passenger from injuries from third persons while in the depot of the company, its baggage-rooms or waiting-rooms, as well as upon its trains or vehicles while being transported.<sup>7</sup> Because of this liability the law permits, and it may be said assists, the carrier in avoiding it. It is therefore well settled that the carrier may refuse to receive persons within its depots or upon its trains as passengers who assault its passengers, or are liable to do so, or to do that for which the carrier would incur a liability. And so it has been held that persons who are insane or disorderly, gamblers, montemen, drunken persons, persons who are extremely filthy or are infected with contagious diseases, or of notorious and unequivocally bad character, or who are guilty of gross and vulgar habits or conduct and create disturbances on board, or who refuse to comply with the reasonable regulations of the carrier, may be rejected by the carrier, and if they have boarded their train or vehicle the carrier may eject them.<sup>8</sup>

§ 612. **Right to separate passengers according to sex.**—While it is true that every person has the right to be transported by the carrier, and, if he complies with its reasonable regulations and is a fit person for carriage, has the right to enter its vehicles as a passenger, it has been held that a regulation which separates the passengers according to sex or which separates passengers into different classes according to the amount of fare they pay or are charged, is a reasonable regulation.<sup>9</sup> And it has been held that a regulation that none but ladies, or ladies

L. 356, 46 Atl. 1099; Spanglor v. St. Joseph, etc. Ry. Co., 68 Kan. 46, 74 Pac. 607, 63 L. R. A. 634. In *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, street car company was held not liable for an injury of a passenger struck by a stone thrown by a strike sympathizer, the company not having any control over such persons.

<sup>7</sup> *Wood v. Railway Co.*, 101 Ky. 703.

<sup>8</sup> *Hutchinson on Carriers*, 539; *Pearson v. Duane*, 4 Wall. (U. S.) 605; *Stevenson v. West Seattle, etc. Co.*, 22 Wash. 84, 60 Pac. 51;

*Freedon v. N. Y. Cent. etc. Co.*, 48 N. Y. S. 584.

<sup>9</sup> *Day v. Owen*, 5 Mich. 520. In *Chilton v. St. Louis, etc. R. Co.*, 114 Mo. 88, 19 L. R. A. 269, held: "A railroad corporation as a common carrier has no right to make unjust discrimination against any passenger, whatever his color, race or sex; and any regulation which would have unjustly discriminated against the plaintiff on account of color alone, would have been contrary to the principles of the common law as well as the provision of the constitution. If the regulation was rea-

accompanied by male attendants or friends, shall be admitted to certain cars, is reasonable and valid.<sup>10</sup> The carrier, however, must furnish a place for the passenger, and where a seat could not be found elsewhere it was held that a passenger might enter the ladies' car from which otherwise the regulations would exclude him.<sup>11</sup>

§ 613. **Separation of races a reasonable regulation.**—In the absence of statutes, any regulation of the common carrier is tested by its reasonableness; and so a regulation of the common carrier requiring the separation of colored from white passengers, if there are no statutes upon the subject, would wholly depend for its legal enforcement upon its reasonableness. Upon this subject the rulings have generally been that the carrier is obliged to furnish equal accommodations to each class. That is to say, if colored passengers, by a regulation of the company, are not allowed to ride in the cars provided for white passengers, it is incumbent upon the company to furnish as equally good and convenient accommodations for such passengers in another part of its train or vehicle, as it is "equality of rights, and not identity or community of rights," that is vouchsafed. The several states may no doubt enact statutes upon this subject forbidding any discrimination or separation, but it seems that such a statute would be void when applied to railroad companies

sonable and just, no rights guaranteed her were denied. The civil rights to which plaintiff, as a passenger, was entitled from defendant as a carrier was a carriage in a car in which accommodations, safety and protection were afforded her equal to what was afforded other passengers paying the same fare." *Civil Rights Cases*, 109 U. S. 3; *Hutchinson on Carriers*, sec. 542; *Hall v. De Cuir*, 95 U. S. 485; *West Chester, etc. Co. v. Miles*, 55 Pa. St. 209. In Iowa it was held that a steamboat company was liable for removing a negro passenger from a dinner table which had been provided and intended for white passengers exclusively. *Coger v. Packet Co.*, 37 Iowa, 145.

<sup>10</sup> *Peck v. Railway Co.*, 70 N. Y. 587.

<sup>11</sup> *Bass v. Railway Co.*, 36 Wis. 450; *State v. Overton*, 27 N. J. L. 485. As to separation of passengers on account of color, see *Hurd v. Railway Co.*, 3 Interstate Com. Rep. 111, where it was held by Commissioner Bragg that the defendant is justified in so doing if the compartment of the car, or the car, as the case may be, is equal in safety of construction, comfort and accommodation, and the protection afforded to passengers, to what is found in other cars in which white women and men travel on the same train, all holding first-class tickets, for which the same fare is paid.

operating lines of railroad extending through different states; that it would not apply to interstate transportation.<sup>12</sup>

This question has often been before the courts, it being urged that this discrimination was illegal because of the fourteenth

<sup>12</sup> Hall v. De Cuir, 95 U. S. 435. Chief Justice Waite, in Hall v. De Cuir, in rendering the opinion in a case where this question was involved, says: "If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if, on one side of a state line, his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be.

If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color. This power of regulation may be exercised without legislation as well as with it. By refraining from action, congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the constitution."

And Mr. Justice Clifford in the same case says: "Repeated decisions of this court have determined that the power to regulate commerce embraces all the instruments by which such commerce may be conducted; and it is settled law that where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

amendment of the constitution, which is as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due

Whatever subjects of this power, says Mr. Justice Curtis, are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. Difficulty may attend the effort to prescribe any definition which will guide to a correct result in every case; but it is clear that a regulation which imposes burdensome or impossible conditions on those engaged in commerce, whether with foreign nations or among the several states, must of necessity be national in its character. . . . Such a subject is in its nature national, and admits of only one uniform system or plan of regulation. Unless the system or plan of regulation is uniform, it is impossible of fulfillment. Mississippi may require the steamer carrying passengers to provide two cabins and tables for passengers, and may make it a penal offense for white and colored persons to be mixed in the same cabin or at the same table. If Louisiana may pass a law forbidding such steamer from having two cabins and two tables,—one for white and the other for colored persons,—it must be admitted that Mississippi may pass a law requiring all passenger steamers entering her ports to have separate cabins and tables, and make it penal for white and colored persons to be accommodated in the same cabin or to be

furnished with meals at the same table. Should state legislation in that regard conflict, then the steamer must cease to navigate between ports of the states having such conflicting legislation, or must be exposed to penalties at every trip. Those who framed the constitution never intended that navigation, whether foreign or among the states, should be exposed to such conflicting legislation; and it was to save those who follow that pursuit from such exposure and embarrassment that the power to regulate such commerce was vested exclusively in congress. . . . Steamers carrying passengers for hire are bound, if they have suitable accommodation, to take all who apply unless there is objection to the character or conduct of the applicant. Applicants to whom there is no such valid objection have a right to a passage, but it is not an unlimited right. On the contrary, it is subject to such reasonable regulations as the proprietors may prescribe for the due accommodation of passengers and the due arrangement of the business of the carrier. Such proprietors have not only that right, but the further right to consult and provide for their own interests in the management of the vessel as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the vessel, or who are guilty of gross

process of law, nor deny to any person within its jurisdiction the equal protection of the laws." But the rulings have been that this amendment does not of itself give congress even the power to protect by legislation the rights pertaining to state or

and vulgar habits of conduct, or who make disturbances on board, or whose characters are doubtful, dissolute, suspicious, or unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests of the patronage of the proprietors so as to make their business less lucrative or their management less acceptable to the public."

"Corresponding views are expressed by the supreme court of Michigan in an analogous case, in which the distinction between the right of an applicant to be admitted on board, and his claim to dictate what part of the vessel he shall occupy, is clearly pointed out. Referring to that subject, the court say the right to be carried is one thing, and the privilege of a passenger on board as to what part of the vessel may be occupied by him is another and a very different thing; and they add, that it is the latter and not the former which is subject to reasonable rules and regulations, and is, where such rules and regulations exist, to be determined by the proprietors. Damages were claimed in that case for refusing the plaintiff the privilege of the cabin; but the court held that the refusal was nothing more or less than denying him certain accommodations from which he was excluded by the rules and regulations of the steamer. Proprietors of the kind may make rules and regulations,

but they must be reasonable; and the court held in that case that to be so they should have for their object the accommodation of the passengers, including everything to render the transportation most comfortable and least annoying, not to one or two or any given number carried at any particular time, but to the great majority ordinarily transported; and they also held that such rules and regulations should be of a permanent nature, and not be made for a particular occasion or emergency. Special and important duties indubitably are imposed upon carriers of passengers for the benefit of the traveling public; but it must not be forgotten that the vehicles and vessels which such carriers use do not belong to the public. They are private property, the use and enjoyment of which belong to the proprietors. Concede what is undoubtedly true, that the use and employment of such vehicles and vessels, during the time they are allowed the privileges of common carriers, may be subjected to such conditions and obligations as the nature of their employment requires for the comfort, security and safety of passengers, still the settled rules of constitutional law forbid that a state legislature may invade the dominion of private right by arbitrary restrictions, requirements or limitations, by which the property of the owners or possessors would be virtually stripped of all utility or value if bound to comply with



natural citizenship; that its inhibitions are directed solely against action by the states, and not against actions by individuals; and that therefore congress had no power to protect rights claimed by colored citizens to occupy places in the carrier's vehicle contrary to the regulation under discussion.<sup>13</sup>

In the *Civil Rights Cases* <sup>14</sup> Mr. Justice Bradley uses this language: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the

the regulations. Both steamboats and railways are modern modes of conveyance; but Shaw, C. J., decided that the rules of common law were applicable to them, as they take the place of other modes of carrying passengers, and he held that they have authority to make reasonable and suitable regulations as regards passengers intending to pass and repass in their vehicles or vessels. They are, said the chief justice in that case, in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered to make such proper arrangements as will promote his own interests, but he is bound to regulate his house so as to preserve order, and, if practicable, prevent breaches of the peace. Cases of like import are quite numerous, and the supreme court of Pennsylvania decided directly that a public carrier may separate passengers in his conveyance; and they deduce his power to do so from his right of private property in the means of conveyance, and the necessity which arises for such a regulation to promote the public interest. Speaking to that point, they say that the private means the carrier uses belong wholly to himself; and they held the right of control in that regard as necessary to enable the carrier to pro-

tect his own interests, and to perform his duty to the traveling public. His authority in that regard, as that court holds, arises from his ownership of the property, and his public duty to promote the comfort and enjoyment of those traveling in his conveyance. Guided by those views, the court held that it is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies which are likely to breed disturbances where white and colored persons are huddled together without their consent." *Cooley v. Board of Wardens*, 12 How. 299; *Henderson v. Mayor of New York*, 92 U. S. 259; *Jencks v. Coleman*, 2 Sumn. 221; *Day v. Owen*, 5 Mich. 520; *Commonwealth v. Powers*, 7 Metc. (Mass.) 601; *Hibbard v. New York & Erie Ry. Co.*, 15 N. Y. 455; *Ill. Cent. Ry. Co. v. Whittemore*, 43 Ill. 420; *Vinton v. Middlesex Ry. Co.*, 11 Allen (Mass.) 304; *West Chester & Phil. Ry. Co. v. Miles*, 55 Pa. St. 209.

<sup>13</sup> *Smoot v. Kentucky Cent. R. Co.*, 13 Fed. 337; *United States v. Washington*, 20 Fed. 630, 4 Wood. 349; *Cully v. B. & O. Ry. Co.*, Fed. Cases No. 3466 (1 Hughes, 536).

<sup>14</sup> 109 U. S. 3, 11.

subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation and state action of every kind which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but in order that the national will thus declared may not be a mere *brutum fulmen*, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innoxious. This is the legislative power conferred upon congress, and this is the whole of it." And it was therefore held that congress could not legislate upon the subjects that are within the dominion of state legislatures, and therefore the act of March 1, 1875, declaring that all colored citizens shall have the same accommodations in inns, public places, conveyances, etc., is unconstitutional, for it belongs to the states. In *West Chester, etc. Co. v. Miles*<sup>15</sup> it was held that "no one can be excluded from carriage by a public carrier on account of color, religious belief, political relations or prejudices." But as to the separation of white and colored passengers, where the accommodations furnished to each were the same, and in all respects comfortable, safe and convenient, and not inferior in any respect the one to the other, the court say: "This question must be decided upon reasonable grounds. If there be no clear and reasonable difference to base it upon, separation cannot be justified by mere prejudice. Nor is merit a test. . . . The right of the carrier to separate his passengers is founded upon two grounds—his right of private property in the means of conveyance, and the public interest. The private means he uses

<sup>15</sup> 55 Pa. St. 209. "At common law a railroad company, as a common carrier of passengers, could not capriciously discriminate between passengers on account of their nationality, color, race, social possession or their political or religious beliefs." *Chicago, etc. Ry. Co. v. Williams*, 55 Ill. 185, 8

Am. Rep. 641. And it has been held that, independently of constitutional or statutory provisions, innkeepers and common carriers are bound to furnish equal facilities to all without discrimination, because public policy requires them to do so. *People v. King*, 110 N. Y. 418, 6 Am. St. Rep. 389.

belong wholly to himself, and imply the right of control for the protection of his own interest, as well as the performance of his public duty. He may use his property, therefore, in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting. This is a proper use of the right of private property, because it tends to protect the interests of the carrier as well as the interests of those he carries. If the ground of regulation be reasonable, courts of justice cannot interfere with his right of property. The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well-regulated separation of passengers. An analogy and an illustration are found in the case of an innkeeper who, if he have room, is bound to entertain proper guests, and so a carrier is bound to receive passengers. But a guest in an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will, or refuse to obey the reasonable orders of the captain of a vessel. . . . If a right of private property confers no right of control, who shall decide a contest between passengers for seats or berths? Courts of justice may interpose to compel those who perform a business concerning the public, by the use of private means, to fulfill their duty to the public—but not a whit beyond. The public also has an interest in the proper regulation of public conveyances for the preservation of the public peace. A railroad company has the right and is bound to make reasonable regulations to preserve order in their cars. It is the duty of the conductor to repress tumults as far as he reasonably can, and he may, on extraordinary occasions, stop his train and eject the unruly and tumultuous. . . . In order to preserve and enforce his authority as the servant of the company it must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their proper separation than it is to quell them."

It would therefore seem to be the rule that state legislatures may regulate this question by statute where the lines of transportation are within their own state, but that they have no power where the companies' lines are what may be called inter-

state lines, and so very many of the states have enacted statutes upon the subject.<sup>16</sup>

#### CERTAIN DUTIES INCUMBENT UPON THE CARRIER.

§ 614. **Implied obligation.**—While the carrier of passengers is not a guarantor of the safety of the passenger he carries, and has a right to rely upon his using at least ordinary intelligence by way of taking care of himself and avoiding injury, nevertheless the degree of diligence required of the carrier is very great. He is under an implied obligation to look after the safety of his patrons, and to do all that he can do to safely transport them.

"The carrier," says Mr. Hutchinson, quoting with approval from *Christie v. Griggs*,<sup>17</sup> "is bound to provide for his safe conveyance 'as far as human care and foresight will go,' and this, or equivalent language, has been employed almost universally in subsequent cases in which the obligation of the passenger carrier has been defined." And in *Palmer v. Canal Co.*<sup>18</sup> the court say: "The carrier must use the utmost care and diligence which human prudence and foresight will suggest." So it follows that this high degree of diligence, this duty to exercise the very highest degree of care, obtains in the operation of almost every department of the carrier's business, this required diligence only being modified as the surroundings are more or less dangerous.

§ 615. **Vehicles, machinery, roadways, tracks, etc.**—The vehicle, whether it be a stage-coach, a steamboat or a railroad train, must be safe and suitable for the purpose for which it is employed. The motive power must be sufficient and suitable for the business; the roadway and tracks must be in condition fit for the undertaking; and it is the duty of the carrier to see that all these are safe and adapted to the purpose for which they are used. Not only is it the duty of the carrier to furnish safe vehicles, machinery, roadways and tracks, but he is required to

<sup>16</sup> "A rule providing for the separation of white and colored passengers in cars in all respects equal in comfort, held to be reasonable." *Chesapeake, etc. Co. v. Wells*, 85 Tenn. 613; *Chicago, etc. Ry. Co. v. Williams*, 55 Ill. 185; *People v. Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232; *Louisville, etc.*

*Ry. Co. v. Mississippi, etc. Co.*, 133 U. S. 587; *Plessy v. Ferguson*, 163 U. S. 537; *Anderson v. Louisville, etc. Ry. Co.*, 62 Fed. 46. And see cases collected, 6 Am. & Eng. Encycl. of Law (2d ed.), 82, 83.

<sup>17</sup> 2 Camp. 79; *Hutchinson on Carriers*, 500, and cases cited.

<sup>18</sup> 120 N. Y. 170.

furnish them with the necessary equipments for the comfort of the passengers; as, for example, the cars must be suitably seated and lighted, with suitable heating apparatus, with necessary retiring rooms; and if it be a sleeping-car or boat upon which night journeys are taken, it must be provided with suitable supplies for its berths and sleeping apartments, such as the ordinary passenger would require.<sup>19</sup>

**§ 616. Stational facilities.**—The carrier is required to furnish proper and suitable stalional facilities, such as platforms, waiting-rooms, and the like; such facilities as the particular business in which he is engaged requires. He must so keep the stations that passengers may with safety enter or leave his vehicles. This liability grows out of the implied invitation of the carrier to persons to come to their stations and avail themselves of the transportation they offer. This duty is, however, more or less modified by the place where the stations or stopping points may be. As, for example, more care is demanded and required at a station in a large city, where a great many passengers daily congregate, depart and arrive, than at a country cross-road or at a mere flag-station where trains seldom stop.<sup>20</sup>

**§ 617. Duty in managing and running its trains or vehicles.** The duty that is imposed upon the carrier of passengers to manage its trains, boats or vehicles is perhaps the most important of all. Railroad trains that are driven through the country at a high rate of speed, governed and directed by the company's servants, and carrying hundreds and thousands of human beings; the immense lines of boats that plough the ocean under the management of the servants and agents of the great carrier companies, but evidence the justice and necessity of the rule of law that holds them to the utmost care and foresight—that highest degree of diligence and prudence which human foresight will suggest; a diligence and care that is commensurate with the dangerous and important business that is being carried on.<sup>21</sup> “And it has been held that public policy and

<sup>19</sup> Wood v. Railroad Co., 84 Ga. 363, 10 S. E. 967.

<sup>20</sup> Railway Co. v. Stacey, 68 Miss. 463.

<sup>21</sup> In the absence of special contracts carriers are required to carry passengers as safely as

human foresight and reasonable care will permit. Ryan v. Gilmer, 2 Mont. 518, 25 Am. Rep. 714. “Carriers of passengers are held to the exercise of the utmost or highest degree of care and diligence for the safety of passengers

safety require that a carrier should be held to the greatest possible degree of care and diligence, and that the personal safety of passengers should not be left to the support of chance or the negligence of a careless agent." <sup>22</sup>

§ 618. **The duty of passengers.**—Duties and responsibilities rest not alone upon the carrier, but, as has been suggested, the passenger has duties that are incumbent upon him. He is an intelligent being endowed with faculties that when properly used assist him to shun danger and avoid its consequences. These faculties he must exercise. He cannot negligently be the cause or contribute to the cause of the injury. From him is required at least ordinary diligence. He must not occupy dangerous and unusual places upon the carrier's conveyance—places that an ordinarily prudent man would not occupy; as, for example, riding upon the bumpers between freight cars, under the cars upon the framework, on the top of the cars, or, in some cases upon the platform or as a stowaway on a steamboat, or in any such like places. His duty is to observe the ordinary and reasonable regulations of the carrier, and failing to do so, the carrier may be relieved of liability, even though the injury occurred by reason of negligence on his part.

that is consistent with the mode of conveyance employed." *North Chicago Street Ry. Co. v. Cook*, 145 Ill. 551.

<sup>22</sup> *Bryan v. Pacific Ry. Co.*, 32 Mo. App. 228.

## CHAPTER III.

### THE PASSENGER CARRIER'S LIABILITY.

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§ 619. The purpose of the chapter.—The discussion of the liability of the passenger carrier takes on so many different phases that it seems necessary to divide the subject into the several sections adopted for its consideration: (1) General principles governing the liability. (2) Liability growing out of duty to passengers while in transit. (3) Ejection of passengers and intruders from the vehicle of the carrier. (4) When the carrier is excused.

## I.

### GENERAL PRINCIPLES GOVERNING THE LIABILITY.

§ 620. The basis of the liability.—The basis of the liability of the passenger carrier is his failure in the particular case to perform his legal duty which results in the injury or damage. But in certain cases the liability resulting from such failure is modified, and may be said to often depend upon the failure of the passenger to do his duty by exercising that ordinary care in avoiding the injury which the law requires of him. Contributory negligence on the part of the passenger is a defense which the carrier may successfully make in some cases, as we shall see, but there are other duties resting upon the carrier to which this defense cannot be made.<sup>1</sup>

<sup>1</sup> Union Pac. Ry. v. Cappler, 66 Kan. 649, 69 L. R. A. 513, where the court discussed this question, in a case where a trespasser on a railroad track was struck by a

moving car and injured without fault of the carrier or his servants. Held that the failure of the carrier's servants to take care of the wounded man was not a vio-



§ 621. **Diligence in the employment of servants.**—The duties of the passenger carrier are very generally performed by servants whom he employs. The traveling public are in the hands of these servants, and constantly, and almost entirely, depend upon their skill, foresight and diligence for safe transportation. As, for example, the train dispatcher, with his crew of assistants at the telegraph key, directs the movements of trains; the engineer, though ever so watchful, depends almost entirely upon the orders furnished him directing the running of his train; by them he drives his engine through the day or the night, drawing its trainload of passengers; the conductor, the brakeman, the trackmen, station agents and switchmen all are servants of the carrier company employed for this very dangerous and hazardous business. The drivers of stage-coaches over mountain passes or through dark ravines by day and by night, where a turn to the right or the left would dash the coach and passengers down the precipice or result in great danger; servants who stand watch upon the steamboat or at the wheel, and who direct its course through storm and boisterous seas,—all these are servants of the great carrier companies selected and put into these responsible positions by them. Public policy demands, the interests of humanity demand, that the carrier should be held to a high degree of diligence in the selecting of these servants. He must know, at least have a reasonable assurance, that they are competent to perform the duties that are laid upon them, for disasters resulting in the loss of life of passengers who have intrusted themselves to the carrier for transportation are inexcusable when caused by the incompetent and reckless management of the carrier's vehicle. In an early case in the supreme court of the United States it was said by Mr. Justice Grier:<sup>2</sup> "When carriers undertake to convey persons by

lation of any legal duty for which the company was liable. In the notes in 69 L. R. A. 513, the principle is applied in several cases cited, as to care due to sick, infirm, disabled and otherwise helpless persons, with whom no contract relation is sustained.

<sup>2</sup> Philadelphia, etc. Co. v. Derby, 14 How. (U. S.) 483. Farish & Co. v. Reigle, 11 Grat. (Va.) 697—

a stage-coach case where the question is reviewed—held: "Carriers of passengers by stages are liable for injuries resulting from the slightest negligence on the part of the driver or proprietor of the stage, and they are bound to use the utmost care and diligence of cautious persons to prevent injury to the passengers. Where a passenger is injured by the un-

the powerful but dangerous agency of steam, public policy and safety requires that they be held to the greatest possible care and diligence; and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passenger should not be left to the support, chance or negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.' "

The same rule applies to proprietors of stage-coaches, and in *Shafer v. Gilmer*<sup>3</sup> the court say: "The law compels stage proprietors to furnish prudent and skilful drivers, and holds them liable for any injury that a passenger may receive on account of any negligence in this particular." And in *Tuller v. Talbot*<sup>4</sup> it was held that the proprietors of a stage-coach should furnish competent and careful drivers, and if a stranger shall be substituted by them, or their agents, in lieu of a regular driver, the proprietors are accountable for his neglect or incompetency, and that the carrier of passengers is required to do all that human

setting of the coach, the presumption is that it occurred by the negligence of the driver, and the burden of proof is on the proprietor of the coach to show that there was no negligence whatsoever."

<sup>3</sup> 13 Nev. 330, 338; *Sales v. Western Storage Co.*, 4 Iowa, 547; *Redfield on Carriers*, sec. 340; *Angell on Carriers*, sec. 569; *McKinney v. Nell*, 1 McL. 540.

<sup>4</sup> 23 Ill. 357. *Frink & Co. v. Coe*, 4 G. Greene (Iowa), 555, held that "stage-coach proprietors who carry passengers for compensation are responsible for all accidents and injuries happening to passengers which might have been prevented by human care and foresight, and they are consequently bound to furnish good and strong coaches and harness, gentle and well-broke horses, skillful and prudent drivers, and the smallest degree of negligence in these particulars will render such proprietors liable for any injury to passengers. Where a passenger has been in-

jured in consequence of the gross negligence of a stage-coach proprietor, by the employment of a known drunken driver, the injured party may be entitled to exemplary damages." In *G. R. & I. Ry. Co. v. Ellison*, 117 Ind. 234: "In an action by a passenger to recover for injuries received in an accident caused by negligence of a watchman in the employment of the defendant, it was held that it was no defense that the defendant had no knowledge of the watchman's incompetency until after the accident; and further, a passenger is entitled to a safe transit, and the carrier is bound to the highest degree of reasonable care." A railroad company is not relieved of liability because its employees acted with reasonable prudence after discovering a danger which their negligence contributed in bringing about. *Kellow v. Cent. Iowa Ry. Co.*, 68 Iowa, 478; *Pershing v. Railroad Co.*, 71 Iowa, 567.

care, vigilance and foresight reasonably can, under the circumstances, in view of the character and mode of conveyance adopted, to prevent accident to passengers.

§ 622. **Safe and sufficient means of transportation.**—As we have seen, it is incumbent upon the carrier of passengers to use safe and suitable vehicles, roadways, motive power and appliances.

The carrier and the passenger do not occupy the same vantage ground in this matter. The carrier undertakes to safely transport the passenger, and impliedly says to him: take passage in this vehicle; it is perfectly safe and suitable for the purpose. The vehicle is known, or ought to be, by the carrier. He is supposed to be skilled not only in the matter of operating but in selecting the means of conveyance. The passenger cannot inspect it and determine its sufficiency; he is entirely dependent upon the carrier, and so the law requires of the carrier the very highest degree of diligence and foresight; and while the carrier cannot be held, as in the case of carriage of goods, to warrant the means of conveyance to be sufficient and adequate, if the defect to which the injury is attributable was such that it could have been discovered by the most careful and competent inspection, by that "utmost care and diligence which human prudence and foresight will suggest," the carrier will be liable.<sup>5</sup>

<sup>5</sup> In *Pennsylvania Ry. Co. v. Roy*, 102 U. S. 451, 457, it was held that the carrier "is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise, upon his part, of extraordinary vigilance aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites for the safe conveyance of passengers. That duty the law

enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. . . . The duty of the railroad company was to convey the passenger over its line, and in performing that duty it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination." *Steamboat New World v. King*, 16 How. (U. S.) 469; *Railroad Co. v. Pollard*, 22 Wall. (U. S.) 341.

Judge Cooley states the rule as to carriers of passengers to be: Such carrier "only undertakes that he will carry them without negligence or fault. But as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men, and his undertaking and liability as to his passengers goes to this extent: that, as far as human foresight and care can reasonably go, he will transport them safely."<sup>6</sup>

**§ 623. Carrier's liability for injuries of servants resulting from negligence of fellow servants.**—Generally the carrier is not liable for an injury suffered by his servant, the result of the negligent act of a fellow servant, engaged in carrying on the same common enterprise. When this rule of the law of liability applies, and what are the modifying circumstances to be considered in determining its application, is the question we have to consider. It is a rule of the common law generally accepted by all courts and important in this connection, that every person is responsible for the consequences of his own wrongful acts, and in whatever business he is engaged must so regulate his actions as not to cause injury to another. While this is the accepted rule, it is as well settled that a person is not generally answerable for the wrongful acts of another. The relation of the parties and the manner of performing the act which results in the injury is however very material in fixing the liability; for coupled with the rules above stated is that principle equally as well settled that when one does an act by another who is his servant acting within the scope of his employment and from it an injury results, the master or employer is liable, for in such case the act of the servant is the act of the master. How these generally accepted and well settled rules of law are to obtain without restric-

<sup>6</sup> Cooley on Torts (2d ed.), 768, 769. See cases cited on page 769. In *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 304, it was said: "Upon grounds of public policy also, the carrier of passengers is bound to exercise the highest degree of care and diligence. To his diligence and fidelity are intrusted the lives

and safety of large numbers of human beings;" and when passengers are carried by steam, the demand for the utmost skill and diligence is especially required, for then, in consequence of the great speed, the hazard to life and limb is largely increased.

tions, in cases where a servant of the master or employer sustains injury resulting from the wrongful act of a fellow servant employed in carrying on the same common enterprise or undertaking and for the same common employer, is the question for discussion; or as generally stated what is the liability of the employer for injuries suffered by his servant the result of the wrongful acts of a fellow servant. Let it be understood at the outset that in the settlement of this question no restrictions or exceptions have been made in the application of the rules of the common law above stated.<sup>7</sup> Important to the better understanding of this subject are those legal principles, before mentioned, which govern to some extent the liability of the employer in this class of cases, making it incumbent upon him to provide suitable and appropriate means for carrying out the object of the employment, to furnish a suitable place, proper material, appropriate machinery, competent servants and in every needful particular to exercise such a degree of care and diligence in this respect as the particular employment demands; and on the part of the servant, that in entering upon the service, he assumes the obvious or ascertainable dangers, discoverable by ordinary care, incident to the employment, and will pursue it with such a degree of care and diligence as the particular business demands.

§ 624. The rule stated—Its origin.—The rule which excuses the master from liability for injuries to a servant resulting from the negligent acts of his fellow servant, may be said to obtain where the master is not guilty of neglect of duty upon his part and the injury suffered is by reason of the negligence of a fellow servant while employed in the conduct of the same common enterprise or undertaking.<sup>8</sup>

<sup>7</sup> *Flake v. Boston, etc. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545.

<sup>8</sup> In *Chicago, etc. R. Co. v. Kneirim*, 152 Ill. 458, 43 Am. St. Rep. 259, the court say: "The rule in this state is that where one servant is injured by the negligence of another servant where they are directly co-operating with each other in a particular business in the same line of employment, or their duties being such as to bring them into habitual association, so

that they may exercise a material influence upon each other, promotive of proper caution, the master is guilty of no negligence in employing the servant causing the injury, the master is not liable."

In *Farwell v. Boston R. Co.*, 4 Metc. (Mass.) 49-58, 38 Am. Dec. 339, the court say: "Where several persons are employed in the conduct of one common enterprise, or undertaking, and the safety of each depends much on the care

The origin of the doctrine is of course, from the relation of the parties and the carrying on of their common enterprises, and co-extensive with the relation of master and servant; and it is said that its first application or statement by the courts of England was in the case of *Preistly v. Fowler*,<sup>9</sup> decided in 1837, and in America in the case of *Murray v. South Carolina Railroad Co.*,<sup>10</sup> decided in 1841. This case was followed by the case of *Farwell v. Boston R. Co.*,<sup>11</sup> which is no doubt the leading case on this subject.<sup>12</sup>

§ 625. When the master's negligence contributes to the injury.—The master's nonliability rests upon his diligence in performing the duties incumbent upon him, and if he has failed in this and the injury is wholly or in part the result of his negligence, he is liable. As where the master furnished defective machinery for use in carrying on his business and a co-servant was injured, by reason of its employment, by a fellow servant, the master would be liable notwithstanding the negligence of the servant in using the defective machinery.<sup>13</sup> Some of the

and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light it is the ordinary case of one sustaining an injury in the course of his own employment in which he must bear the loss himself or seek his remedy, if he have any, against the actual wrong-doer."

<sup>9</sup> 3 M. & W. 1.

<sup>10</sup> 1 McMull. L. (S. C.) 385, 36 Am. Dec. 263.

<sup>11</sup> 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

<sup>12</sup> In *Anderson v. Bennett*, 16 Ore. 515, 8 Am. St. Rep. 311, Lord J., in delivering the opinion of the court, said: "Although *Murray v. South Carolina R. Co.* . . . was decided prior to *Farwell v. Boston R. Corp.* . . . yet the latter has been usually regarded as the leading case in which the doctrine of fellow servant was first clearly enunciated and its principles engrafted into our law." Numerous cases where the law has been applied by the several supreme courts of the states may be found cited in 12 Am. & Eng. Ency. of L. (2d ed.) page 398, note 4.

<sup>13</sup> *Ocean S. S. Co. v. Matthews*, 86 Ga. 418; *Sherman v. Menominee, etc. Co.*, 72 Wis. 122; *Cone v. Delaware, etc. R. Co.*, 81 N. Y. 206, 37 Am. Rep. 401.

courts have held that the negligence of the master must be the proximate cause of the injury but the authorities are not entirely harmonious upon this question; and where the coupling of a car was defective and a brakeman was obliged to get under the platform to couple the cars and while there the conductor, not knowing he was so engaged, signaled the engineer to move the train and the brakeman was killed, it was held that the railroad company was not liable, that the proximate cause of the injury to the brakeman was the negligence of a fellow servant and not a defective coupling.<sup>14</sup> But it cannot be said that this is the holding of the majority of the courts. The weight of authority seems to be as stated in *Boyce v. Fitzpatrick*<sup>15</sup> that "Where a servant assumes the risk, more or less hazardous, of the service in which he engages he has a right to assume that all reasonable attention will be given by his employer to his safety and that he shall not be carelessly or needlessly exposed to risk which might be avoided by ordinary care and precaution on the part of his employer. And where the injury was caused by reason of a defective trestle work and partly by the negligence of fellow servants, plaintiff was allowed to recover.<sup>16</sup> As was said by the court in *Paulmier v. Railroad Company*:<sup>17</sup> "The servant does

<sup>14</sup> *Pease v. Chicago, etc. R. Co.*, 61 Wis. 163, 17 Am. & Eng. R. Cases, 527; *Philadelphia Iron, etc. Co. v. Davis*, 111 Pa. St. 597, 56 Am. Rep. 305.

<sup>15</sup> 80 Ind. 526.

<sup>16</sup> *Elmer v. Lock*, 135 Mass. 575.

<sup>17</sup> 34 N. J. L. 155. In *Balhoff v. Michigan Central R. Co.*, 106 Mich. 606, 612, Mr. Justice Hooker has stated the rule as to the duty of the master to furnish a safe place and appliances for performing the service. This was a railroad case. The court say: "The master owes the duty of furnishing a reasonably safe track, and this is a responsibility from which the company is not relieved by confiding the duty of construction or repairs to competent servants. Such are the master's agents, and their negligence is his negligence. They

may be fellow-servants of others engaged in making the repairs, but not of those for whose use and benefit they are made. Nor does the fact that the persons making repairs may be employed in fellow service with the injured person, in other work, relieve the master. The duty is one that the master cannot escape by delegating it." For authorities upon this branch of the case, see cases cited in *McKinney, Fel. Serv.* sec. 29, and note; *Benzing v. Steinway*, 101 N. Y. 547; *Herbert v. Railroad Co.*, 3 Dak. 38; *Sanborn v. Trading Co.*, 70 Cal. 261; *Capper v. Railway Co.*, 103 Ind. 305; *Fort v. Railroad Co.*, 2 Dill, 259; *Krueger v. Railroad Co.*, 111 Ind. 51.

The duty to furnish a safe place to work is asserted in the cases of *Swoboda v. Ward*, 40 Mich. 423,

not agree to take the chances of any negligence on the part of his employer, and no case has gone so far as to hold that when such negligence contributes to the injury, the servant may not recover. It would be both unjust and impossible to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servant. Contributory negligence to defeat a right of action must be that of the party injured."

**§ 626. When the injury is the result of the negligence of an incompetent fellow servant.**—As we have seen it is the duty

and *Smith v. Car Works*, 60 Mich. 504. In *Van Dusen v. Letellier*, 78 Mich. 492, Mr. Justice Morse reiterates the doctrine, and asserts that one to whom the duty is delegated represents the master, and is not the fellow-servant of an operative using the place. This doctrine was again asserted in *Brown v. Gilchrist*, 80 Mich. 65, and, as applied to machinery, is laid down in *Morton v. Railroad Co.*, 81 Mich. 423, by Mr. Justice Cahill, who asserts that delegation of the duty will not relieve the master of responsibility. The same is said in the case of *Sadowski v. Car Co.*, 84 Mich. 106. Mr. Justice Champlin recognized the rule in *Fox v. Iron Co.*, 89 Mich. 393. It was applied in *Ashman v. Railroad Co.*, 90 Mich. 567, where it was held that the duty of blocking a frog could not be delegated so as to relieve the company from responsibility. It should be stated, however, that this was a statutory duty. Mr. Justice Long followed these cases in his opinion in the case of *Roux v. Lumber Co.*, 94 Mich. 615, and recognized it in *Dewey v. Railway Co.*, 97 Mich. 332. It has been reaffirmed in the case of *Beesley v. F. W. Wheeler & Co.*, 103 Mich. 196, and recognized in both opin-

ions in the case of *Schroeder v. Railroad Co.*, 103 Mich. 213.

"It would seem that it should be considered as settled in this state that the master must furnish a reasonably safe place, and cannot avoid responsibility by delegating the duty. If this is so, what reason can there be for saying that the trackmen, to whom belongs the labor of keeping the track in repair and safe condition, are fellow servants of the trainmen, who use it? The reason given is that our decisions hold that section men and trainmen are fellow servants. An examination of the cases will show that in some, if not all, of them the section men and trainmen were, as a matter of fact, engaged in a common service, and therefore were fellow servants. Where the section men assist the trainmen in operating the road, as by throwing switches, coupling cars, etc., or the trainmen assist in repairing the road, by taking laborers upon a construction train, and all, in their respective capacities, engage in removing debris, or restoring derailed rolling stock to its place upon the rails, they are engaged in a common service, whatever their other general duties may be."



of the master to furnish competent fellow servants. The co-servant in assuming the ordinary risk of the employment does not assume the risk of the negligence of incompetent fellow servants unless he has had notice of such incompetency before entering upon the service. And so when the injury is the result of the negligence of an incompetent fellow servant, the master is liable. Not that the master warrants to his servants the competency of every fellow servant in his employ; the obligation of the master does not go to that extent, but he is required to exercise ordinary diligence in the employment and retention of such servants, an ordinary diligence measured and defined by the particular business in which he is engaged and the danger of the situation the servant is required to assume. In the business of the common carrier that situation is often a hazardous and dangerous one and the diligence of the master must be commensurate with the service required. The definition of ordinary diligence in this particular is as has been generally stated.<sup>18</sup> Examples that might be cited, illustrating negligence of common carriers in this respect, are numerous; as the employment of incompetent engineers to run their locomotives, of incompetent conductors to manage their trains, inefficient train dispatchers or bridge builders or roadmasters.<sup>19</sup> If the carrier or master knows of the inability of the servant and continues him in his employ he is liable for the servant's negligent acts, the result of his incompetency, or if because of his general reputation for incompetency, or numerous incompetent acts, the master, exercising ordinary diligence, ought to have knowledge of his inability, or if there is enough to put the master on inquiry, which if followed up would lead to such knowledge, then the master would be held to have knowledge of whatever his investigation would lead to, and his liability would be increased accordingly.<sup>20</sup>

<sup>18</sup> *Wabash R. Co. v. McDaniels*, 107 U. S. 454; *Western Stone Co. v. Whalan*, 151 Ill. 472; *Michigan Central R. Co. v. Gilbert*, 46 Mich. 176; *Howorth v. Seevers Mfg. Co.*, 87 Iowa, 765.

<sup>19</sup> *Illinois Central R. Co. v. Jewell*, 46 Ill. 99; *Haskins v. New York Central R. Co.*, 65 Barb. (N. Y.) 129; *Timm v. M. C. R. R.* 98 Mich. 226, cases where servants

have been addicted to drinking habit have been classed with these examples; *Baltimore, etc. R. Co. v. Henthorn*, 73 Fed. 734; *Chicago, etc. R. Co. v. Sullivan*, 63 Ill. 293.

<sup>20</sup> *Hilts v. Chicago, etc. R. Co.*, 55 Mich. 437; *Michigan Central R. Co. v. Gilbert*, 46 Mich. 176, and see cases above cited.

§ 627. Superior servant rule as contradistinguished from the alter ego or vice principal doctrine.—In some of the states, the courts have held that the rule laid down as fundamental in the beginning of this discussion, namely, that every person is responsible for his own wrongful acts, but not for the acts of another,<sup>21</sup> is subject to some restrictions or modifications when applied to determining the liability of the master or principal for an injury to a co-servant the result of the negligent acts of a fellow servant, in this, that a servant not a vice principal or *alter ego* of the master but one who in the course of carrying on the business or common pursuit occupies a position among his co-servants superior to them in authority (as a superintendent, foreman, conductor or engineer), represents the master to such an extent that he may render him liable to a co-servant for an injury received, the result of obedience of the orders of such superior servant.

This is called the superior servant rule and has frequently been applied in cases where an engineer or brakeman has been injured as a result of obeying the orders of a conductor, or because of his negligence in running his train, or where the foreman of a gang of men engaged in graveling or repairing the road-bed under the general directions of the roadmaster has given orders by way of directing the work which has resulted in an injury to a co-servant.

In the case of *Chicago, etc., R. Co. v. Ross*,<sup>22</sup> decided by the Supreme Court of the United States December 8, 1884, the action was by an engineer of a freight train for an injury sustained in a collision with a gravel train, the result of the negligence of the conductor in charge of the train on which the injured engineer was employed. Mr. Justice Field in the course of the opinion said "When the service to be rendered requires for its performance the employment of several persons as in the movement of railway trains, there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such cases, that he takes upon himself the risks arising from the negligence of his fellow-servants, while in the same employment, provided always the master is not negligent in their selection or retention or in furnishing ade-

<sup>21</sup> *Ante*, § 623.

<sup>22</sup> 112 U. S. 337, 28 L. Ed. 787.

quate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable.” “There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters and other subordinates employed. He is, in fact and should be treated, as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him, in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day, several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow-servant with the fireman, the brakeman, the porters and the engineer. The latter are fellow-servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation. As observed by Mr. Wharton in his valuable treatise on the Law of Negligence: ‘It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But if this be true, it would relieve corporations from all liability to servants. The true view is,

that as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation."

This case was followed by several cases in the federal courts and in a number of the states, notably Illinois, Tennessee, Virginia, Kentucky, Georgia, and similar holdings may be found in Ohio, North Carolina, Kansas, Nebraska and Missouri, but this is not the generally adopted doctrine. The weight of authority holds that to hold the principal liable for such injuries the co-servant who committed the negligent act or by reason of whose orders it resulted, must occupy the relation of vice principal or *alter ego* of the master; that when this relation exists the *alter ego* or vice-principal, is the master and the negligent act or order, is the act or order of the principal and the liability necessarily is the master's.

The rule is thus clearly stated by Mr. Justice Champlin in *Hunn v. Railroad Co.*:<sup>23</sup> "Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision except the master's) over the actions of the employees engaged in carrying on the particular branch of the master's business, and acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employees to obey, then he stands in the place of the master, and is not a fellow servant with those whom he controls."

In the case of *Baltimore, etc. R. Co. v. Baugh*,<sup>24</sup> a case decided by the supreme court of the United States in 1893, that court seems to have adopted the vice-principal or *alter ego* doctrine instead of the superior servant doctrine, following, as we have stated, the weight of authority upon this subject. The facts in the case may be briefly stated. An engineer and fireman were employed in running an engine engaged in assisting trains up a grade. The engine, after assisting a train, complying with the rules of the company might return in one of two ways, on orders from the train dispatcher or by following a regular train carrying a flag indicating that it was following. The engineer in

<sup>23</sup> 78 Mich. 513, 519, and see authorities cited in the opinion. *Darringer v. Railroad Co.*, 52

Conn. 285; *Beesley v. F. W. Wheeler & Co.*, 103 Mich. 196.

<sup>24</sup> 149 U. S. 363, 37 L. Ed. 772, 781.

charge of the engine adopted neither of these ways, but was running back without orders or signal when he came in collision with a train running in the opposition direction and the plaintiff (the fireman) was injured. The court in its opinion discussing the liability for the injury among other things say: "Again a master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant then negligence in the act is the negligence of the master; but if it be not done in the discharge of such positive duty then there should be some personal wrong on the part of the employer before he is held liable therefor." <sup>25</sup>

<sup>25</sup> See notes and cases collected and cited in the report of this case in 37 L. Ed. (U. S. Rep.) pages 772-775.

A full and valuable discussion of the subject may be found in

the case of *Jackson v. Norfolk, etc. R. Co.*, 43 W. Va. 380, and in notes collected and cases cited in 46 L. R. A. 337, with a report of the case. In that case the court say: "The difficult question is who

§ 628. Act of congress to regulate liability.—The Congress of the United States under the powers delegated to regulate

are fellow servants? Necessity calls for some test or rules generally applicable in the multitudinous cases everywhere; and a principle of justice here presents itself furnishing that rule, putting on the master liability when he should bear it, and leaving with the servant the misfortune where he should bear it. That principle logically says that we must look at the act negligently done causing the injury, and if the performance of that act is a duty which the master is required by law to do properly, then he is liable, whether he negligently does the act himself or through another as his servant; but if it is not an act of duty imposed by law upon the master, but one purely the duty of another servant to do properly, both for the benefit of his master and his servant, the master is not liable. I repeat that it depends upon the character of the act negligently done. Is it a duty of the master to the servant? We must therefore see what duty the master owes to the servant. These duties are well summed up according to the received law in *Madden v. Chesapeake & O. R. Co.*, 28 W. Va. 617, 57 Am. Rep. 695, as follows: 'First, to provide safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and making proper inspections and tests. Second, to exercise like care in providing and retaining sufficient and suitable

servants for the business. Third, to establish proper rules and regulations for the service, and having adopted such to conform to them. All the foregoing duties, it will be observed, are included in the one general duty of the master to provide a safe plant. The law is well settled that the master is not required to be a guarantor or insurer in this behalf; but is only required to employ reasonable and ordinary care in selecting what he requires and is necessary for his business. I will add that he must furnish a safe place in which a servant is to work.'

"The doing of these things is a duty of the master to the servant for the latter's safety. The master can either perform these duties personally, or he may delegate their performance to some one else, whom the books call vice-principal, because he stands as to these duties in the place of his master; but if either fails in the performance of duty in any of these respects, and damage results to a servant, the master must answer. If, however, the damaging negligent act is not one of the things which rests on the master as a duty to the servant, it is the act purely of a fellow servant, and the injured servant must look to him, not to the master. These duties falling on the master to perform are called in the law books non-assignable duties because he owes them to the servant and he cannot assign them to another to perform and exempt himself from liability for their misperformance. These du-

commerce with foreign nations and among the several states<sup>28</sup> passed an act entitled "An Act relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers engaged in commerce between the states and

ties are sometimes spoken of as duties in construction, preparation, and preservation, as contrasted with mere work of operation. For instance, the construction of the railroad or other work, the preparation of machinery and implements to be used in the business, the preservation of the tracks or working place, or machinery and appliances, in proper, safe condition, and the selection of proper servants to work. The master having well done his duty in these things, their handling and use in the prosecution of the work designed is a work of mere operation, and this work the servant must perform well in the interest of his master and fellow servants, and if one fails to do so and injures a fellow-servant, the master is not liable, since he cannot always stand by and watch the servant in his every act in the carrying on or the operation of the business, and the law of necessity permits him to commit his work of mere operation to other hands. To illustrate: the employer must furnish a good wagon, railroad car, or brake, or mowing machine, and falling herein to the injury of his employee using them in ignorance of deficiency, he must repair the injury. But having them, if one servant by their careless use injures a fellow servant, the master is not liable to repair his injury. For the misuse of these things by a servant the master would be liable to strangers, but not to another servant, because when he

entered upon the service he assumed the risks and dangers that might occur in the business, among them the dangers that he might receive injuries from the negligence of a fellow servant. It would be unjust to make the master an insurer of every servant against the negligence of every act of other servants in many instances numbering thousands, working over hundreds of miles or a wide area of territory, the master necessarily himself absent. What man or corporation engaged in any business could endure such danger and burden? It would be a crying injustice to the farmer, merchant, coal operator, railroad or steamboat, to all business operators. The law is severe enough in holding employers responsible for machinery, etc., as above stated, without making them guarantors for the acts of every servant. You cannot make the master liable for an act of mere operation, no matter by what servant done; you cannot exempt him for an act not one of mere operation, but of his personal duty though done by any servant."

In *Sofield v. Guggenheim & Co.*, 64 N. J. L. 605, 50 L. R. A. 417, the court follows the doctrine of vice-principal act rendering master liable, and in the opinion cites numerous authorities.

The editorial notes in 50 L. R. A. 417, are valuable and exhaustive upon this subject.

<sup>28</sup> Sec. 3, art. VIII, Const. U. S.

between the states and foreign nations to their employees," which was approved June 11, 1906. By this act congress has undertaken to enlarge the liability of the common carrier, providing among other things that every common carrier operating in the District of Columbia or the territories or engaged in interstate commerce "shall be liable to any of its employees, or in case of his death to his personal representatives for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, ways or works." What the courts will do with the constitutionality of this act remains to be seen. It has been passed upon in some of the circuit courts and pronounced unconstitutional, but the supreme court of the United States has not yet construed it.

"That in all actions hereafter brought against any common carrier to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury." The other sections of the act are not material to our discussion.

It has been urged that this act is unconstitutional for the reason that congress has exceeded its delegated powers in enacting a law which attempts to regulate commerce in the states, as well as interstate commerce, the questions of the nonliability of carriers for injuries to servants by their fellow servants, and the law of contributory negligence being subjects within the control of state legislatures and not of congress;<sup>27</sup> that the act is

<sup>27</sup> In support of the claim that the individual states may legislate upon the subjects the cases relied on are numerous, among them *Tullis v. Lake Erie, etc. R. R.*, 175 U. S. 348; *Southern Pa-*

*cific v. Schoer*, 114 Fed. 470; *Missouri R. R. v. Mackey*, 127 U. S. 206; *Lake Shore, etc. R. Co. v. Ohio*, 173 U. S. 285; *Cleveland, etc. R. Co. v. Illinois*, 177 U. S. 514.



not a law for the regulation of commerce, in the sense used in the constitution, but one within the general legislative powers of the states;—relying for this position upon the definition of Chief Justice Marshall in *Gibbons v. Ogden*,<sup>28</sup> where he used this language: "What is this power? It is the power to regulate; that is, to prescribe the rules by which commerce is to be governed." On the other hand it is claimed for the act that congress has the power, and it is conceded, to regulate commerce among the states, relying more or less upon the doctrine as announced. In *Baltimore, etc. R. Co. v. Baugh*,<sup>29</sup> where Mr. Justice Brewer in discussing the question said: "Commerce between the states is a matter of national regulation. . . . Today the volume of interstate commerce far exceeds the anticipation of those who framed the constitution. . . . The lines of this very plaintiff in error extend into a half dozen or more states, and its trains are largely employed in interstate commerce. As it passes from state to state, must the rights, obligations and duties subsisting between it and its employees change at every state line? If to a train running from Baltimore to Chicago, it should, within the limits of the state of Ohio, attach a car, for a distance only within that state, ought the law controlling the relations of a brakeman on that car to the company be different from that subsisting between the brakeman on through cars and the company? . . . It is obvious that the relations between the company and employee are not in any sense of the term local in character, but are of a general nature and to be determined by the general rules of the common law. The question is not local but general."

In the case of *Brooks v. The Southern Pacific Railroad Co.*,<sup>30</sup> it was held that because the act merely imposes a liability upon

<sup>28</sup> 9 Wheat. (U. S.) 189-196; *Aldyston Pipe, etc. Co. v. United States*, 175 U. S. 212.

<sup>29</sup> 149 U. S. 378. And in *Pierce v. Van Dusen*, 78 Fed. Rep. 693, Mr. Justice Harlan in an opinion involving the Employers' Liability Act said: "Undoubtedly the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by con-

gress under its power to regulate commerce among the states."

Numerous cases might be cited as bearing upon this question, but it is not our province to discuss the constitutionality of this law, but simply to call attention to the contention.

<sup>30</sup> This case was tried in the United States circuit court for the Western District of Kentucky, and decided by Judge Evans, December 31, 1906

interstate carriers to their employees and does not prescribe rules for carrying on commerce among the states, it does not regulate such commerce and is therefore beyond the power of congress and unconstitutional. And that even if it should be considered an act regulating commerce among the states in the course of such regulation it must necessarily regulate commerce within the several states and for this reason embraces a regulation which is not within the power of congress, the two subjects, the regulating of interstate commerce and intra-state commerce being so connected in this case that they cannot be separated and therefore the act must be declared unconstitutional. And in the case of *Howard, Adm'x v. Illinois Central R. Co.*,<sup>21</sup> the act was declared unconstitutional among other things because if it regulates commerce at all it regulates intra-state commerce as well as interstate commerce. It therefore being impossible to separate these attempted regulations in the act it is unconstitutional. It must be remembered in connection with this discussion that the states have not delegated to the federal government the right to regulate commerce within the several states and that the several states have in most cases passed statutes regulating the liability for injuries received as the result of acts of fellow servants.

§ 629. — **Passenger elevators.**—The same degree of responsibility attaches to those controlling and running passenger elevators. "Persons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control, by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employment to avoid injury to those they carry. The care and diligence required is proportioned

<sup>21</sup> Circuit court for the District of Tennessee, Western Division, opinion by Judge McCall, January 1, 1907.

to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised; where the danger is great, the utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence. We know of no employment where the law should demand a higher degree of care and diligence than in the case of the persons using and running elevators for lifting human beings from one level to another. The danger of those being raised is great. When persons are injured by the giving way of the machinery the hurt is always serious, frequently fatal; and the law does and should bind persons so engaged to the highest degree of care practicable under the circumstances. It would be injustice and cruelty to the public for courts to abate in any degree this high degree of care. The aged, the helpless and the infirm are daily using these elevators. The owners make profit by these elevators, or use them for the profit they bring to them. The cruelty from a careless use of such contrivances is likely to fall on the weakest of the community. All, including the strongest, are without the means of self-protection upon the breaking down of the machinery. The law, therefore, throws around such persons its protection by requiring the highest care and diligence. The carrier of passengers is under obligations to use the utmost care and diligence in providing safe, suitable and sufficient vehicles for the conveyance of his passengers."<sup>32</sup>

§ 630. — Bound to adopt most approved machinery.— It is said that railroads and other carriers of passengers must keep pace with science, art and modern improvements in their appliances for the carriage of passengers.<sup>33</sup> It is the duty of the carrier company, in this particular, to use the best mechanical appliances and to exercise the highest degree of prudence and skill in determining that all their appliances are safe for the purpose of transportation, and in case an accident results from a failure to use such appliances, or to exercise the proper degree of care and skill, they are liable in damages. This, however, does not mean that they are bound to adopt any mere

<sup>32</sup> Treadwell v. Whittier, 80 Cal. 574, 5 L. R. A. 498; Baltimore & H. Ry. Co. v. State, 29 Md. 252; Va. Cent. Ry. Co. v. Sawyer, 15 Grat. (Va.) 230; Kelly v. N. Y.

& S. B. Ry. Co., 109 N. Y. 44; Northern Pac. Ry. Co. v. Herbert, 116 U. S. 651.

<sup>33</sup> Meier v. Pa. Ry. Co., 64 Pa. St. 225.

speculative or untried experiments; they are not responsible for the unknown as well as the new, but they should adopt such improved and tried appliances as have been tested and found useful, and which materially contribute to the safety of the passenger.<sup>34</sup> As was said by Mr. Justice Church: "It is established that the carrier of passengers, especially in vehicles and conveyances propelled by steam where the consequences of an accident from defective machinery are almost certainly fatal to human life, is bound to use every precaution which human skill, care and foresight can provide, and to exercise similar care and foresight in ascertaining and adopting new improvements to secure additional protection."<sup>35</sup> But it has been held that while railroad companies, as common carriers, are bound to have such vehicles and machinery for the transportation of goods as the improvements known to practical men and tested by practical use may suggest, they are not bound to take every possible precaution which the highest scientific skill might suggest, nor to adopt mere speculative and untried experiments.<sup>36</sup>

§ 631. — **Latent defects.**—Where the injury is the result of such a latent defect in the appliances or machinery of the carrier that no degree of skill, care or foresight can detect it, the carrier is not liable, for there is no lack of diligence upon his part; he cannot be shown to have been guilty of a degree of negligence sufficient to warrant a recovery. Where the injury was caused by the breaking of an axle of a stage-coach, and no negligence could be shown, it was held, if the axletree was sound as far as human eye could discover, the defendant was not liable.<sup>37</sup> And where it appeared that the breaking of the axletree of a coach resulted in an accident, and that the breaking occurred because of a very small flaw surrounded by sound iron, which could not have been discovered by the most careful ex-

<sup>34</sup> *Barron v. East Boston Ferry Co.*, 11 Allen (Mass.), 312. In *Warren v. Fitchburg, etc., R. Co.*, 8 Allen, 227, the court say: "They are not to take every possible precaution to prevent injury for that would be inconsistent with the cheapness and speed which are among the chief objects of railway traveling. Their care is to be exercised in relation to such

matters, and in such ways, as are appropriate to the business they have undertaken, to afford proper and reasonable securities against danger."

<sup>35</sup> *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

<sup>36</sup> *Steinweig v. Erie Ry. Co.*, 43 N. Y. 123.

<sup>37</sup> *Christy v. Griggs*, 2 Camp. 79.

ternal examination, it was said by the court: "Where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense."<sup>38</sup> And where a plaintiff while a passenger on the defendant's road was injured by an accident which was caused by the breaking of a tire of one of the wheels of the carriage in which he was seated, and it was shown that such breaking was owing to an air bubble, which could neither be discovered in the course of manufacture nor afterwards, and there was no negligence proven on the part of either the manufacturer or the railroad company, it was held that the defendant was not liable.<sup>39</sup>

It will be noticed from the line of decisions that it is not every latent defect that will excuse the carrier; it is only such a latent defect as no reasonable degree of human skill and foresight could guard against. So, carriers are held to a strict inspection; they are required to make vigilant search for any imperfections or defects that might occasion an accident. If the defect could have been discovered by the most careful and thorough examination, or if any certain or satisfactory test is known which is within reach of the carrier, and he fails to apply such test but relies upon a test which is clearly insufficient, the carrier would be liable.<sup>40</sup>

§ 632. — **English rule.**—Until the case of *Readhead v. Midland Ry. Co.*, above cited, the English courts had held that a latent defect would not excuse the carrier, but that if the injury occurred from any defect in the appliances of the carrier, its vehicles or machinery, the carrier was liable, resting their opinion upon the ground that it was a duty of the carrier to furnish fit and safe appliances, and that a failure to do so rendered him liable. The leading English case is that of *Sharp v. Grey*,<sup>41</sup>

<sup>38</sup> *Ingalls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

<sup>39</sup> *Readhead v. Midland Ry. Co.*, L. R. 2 Q. B. 412; affirmed, 20 L. T. (N. S.) 628.

<sup>40</sup> *Hadley v. Cross*, 34 Vt. 586; *Ingalls v. Bills*, 9 Metc. (Mass.)

1; *Edwards v. Lord*, 49 Me. 279; *Texas & P. R. Co. v. Hamilton*, 66 Tex. 95; *Palmer v. Delaware, etc. Canal Co.*, 120 N. Y. 170, 17 Am. St. Rep. 629, 44 Am. & Eng. R. Cases, 298.

<sup>41</sup> 9 Bing. 457.

where the court virtually held that the carrier warranted the sufficiency of his vehicle; but since the holding in *Readhead v. Midland Ry. Co.* it may be said that the English and American rule is the same, and that carriers are not liable for injuries occasioned by latent defects in their appliances or vehicles which could not by any human care or skill have been detected or prevented, but that it is the duty of the carrier to apply every known practical test for the discovery of such defects.

§ 633. — **Defects discoverable by manufacturer.**—It has been held by a line of authority, and perhaps it may be said to be the weight of authority, that the carrier is liable for an injury which is the result of defects in the appliances, vehicles or machinery which, by the inspection usually given to such appliances after they are purchased and put in service, could not have been discovered, no matter how thorough or competent, but which could have been discovered and known to the manufacturer by the application of reasonable tests known to skillful manufacturers, and which ought to be made before delivering the work. This rule may be said to be based upon the theory that the obligation of the carrier is to furnish suitable and fit conveyance to the passenger, and, as has been shown, if by the exercise of the highest degree of skill and prudence defects cannot be discovered, he may be excused, but not otherwise. So the manufacturer whom the carrier calls upon to furnish conveyances, appliances and machinery for carrying passengers is but the agent or servant of the carrier, and for any negligence upon his part in receiving and furnishing such conveyance, machinery or appliances resulting in injury to the passenger the carrier is answerable. In other words, for the failure of the manufacturer to discover any defects which might be detected by the application of the best known tests of skillful manufacturers, and which occasioned injury to the passenger, the carrier would be liable. A leading case upon this subject and holding to this rule is that of *Hageman v. Western R. Corp.*,<sup>42</sup> where Chief Justice Gardner in discussing this doctrine said: "The substance of the charge was that, although the defect was latent and could not be discovered by the most vigilant external examination, yet, if it could be ascertained by a known test applied either by the manufacturer or the defendant, the latter was responsible. In

<sup>42</sup> 13 N. Y. 9, 64 Am. Dec. 517.

these instructions there was no error." And after quoting from the opinion in *Ingalls v. Bills*, where it was held that a carrier was not liable for an injury which resulted in the breaking of the axle of a stage-coach, the fracture being occasioned by reason of a defect which was entirely surrounded by iron and therefore latent, the chief justice further says: "I concur in that decision in the particular case presented; but the learned judge did not intimate 'that a sound judgment and the most vigilant oversight' would be evidenced by the adoption of the same methods of examination in the case of a stage-coach and a car for the express train of a railroad. The mode of construction, the purposes to be subserved, and, above all, the probable consequences of a hidden defect in the two cases, are altogether different. It might as plausibly be urged that a chain for agricultural purposes and the cable of a ship of the line should be subjected to the same tests, because both were chains and each manufactured of the same material. Keeping the distinction indicated in view, the charge was sufficiently favorable to the defendant. . . . It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron, or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is that they shall furnish a sufficient car to secure the safety of their passengers by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case they engage that all that well directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance. If to this extent they are not responsible, there is no security for individuals or the public." <sup>43</sup>

<sup>43</sup> *Treadwell v. Whittier*, 80 Cal. 574. In *Philadelphia, etc. Co. v. Anderson*, 94 Pa. St. 351, it was said: "Where for a consideration a railroad company undertakes to transport a passenger from one

point of its line to another, there arises an implied contract on the part of the company that it has, for that purpose, provided a safe and sufficient road and that its cars are safe and trustworthy.

A contrary doctrine, however, is held by the supreme court of Tennessee and also by the supreme court of Michigan.<sup>44</sup> The opinion of the Michigan court, by Campbell, C. J., is strong in its logic and reasoning. He says: "It was held by the court below that no diligence or care in the railroad company could exempt them from want of care in the manufacture of the cars and axles. This doctrine is, we think, entirely incorrect. Carriers of freight are liable, whether careful or not, for any act or damage not caused by the act of God or of the public enemy. Their liability, therefore, does not arise from negligence or want of care. It arises from their failure to make an absolutely safe carriage and delivery, which they insure by their undertaking. The analogies of carriers of freight have nothing to do with passenger carriers. These are liable only when there has been actual negligence of themselves or their servants. If they exercise their functions in the same way with prudent railway companies, generally, and furnish their road and run it in the customary manner, which is generally found and believed to be safe and prudent, they do all that is incumbent upon them. This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from whom they made their purchases of stock, however high in standing and reputation as reliable persons. There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will, in general, make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all

And where a person is injured by an accident arising from a collision, or a defect in the machinery or roadway, he is required, in the first place, to prove no more than the fact of the accident and the extent of the injury; a *prima*

*facie* case is thus made out and the *onus* is cast upon the carrier to disprove negligence."

<sup>44</sup> Nashville, etc. Ry. Co. v. Jones, 9 Helsk. (Tenn.) 27; C. R. & I. Ry. Co. v. Huntley, 38 Mich. 587, 31 Am. Rep. 321.



that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers for anything which they could not avoid by their own diligence." <sup>45</sup>

## II.

### LIABILITY GROWING OUT OF DUTY TO PASSENGERS WHILE IN TRANSIT.

§ 634. **The degree of care required.**—That same high degree of care and diligence, "the utmost care and diligence which human prudence and foresight will suggest," is required of the carriers of passengers in operating the machinery, appliances and vehicles employed by them in their business, and this requirement rests upon every passenger carrier,—the stage-coach proprietor, the street-car operator, the railroad company, ferry companies, proprietors of passenger elevators,—all who are engaged in transporting passengers." <sup>46</sup> As has been observed, the degree of diligence depends almost entirely upon the elements

<sup>45</sup> Grand Rapids, etc. Ry. Co. v. Huntley, 38 Mich. 537-546.

<sup>46</sup> While the carrier is held bound to exercise the highest degree of care for the safety and protection of the passenger, and is responsible for the negligence of his servants which results in injury to the passenger though not within the scope of the servant's employment, the rule does not go to the extent of holding the carrier as an insurer of the personal safety of the passenger. Taillon v. Mears et al., 29 Mont. 161, 1 Am. & Eng. Ann. Cases 613, and notes.

That the carrier is liable for the negligence of his servants though not within the scope of

the servant's employment, very many authorities are cited.

In Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 37, a passenger was assaulted by a brakeman and the company was held liable. Craker v. Chicago, etc. R. Co., 36 Wis. 637, 17 Am. Rep. 504; Birmingham, etc. R. Co. v. Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752; New Jersey Steamboat Co. v. Brockett, 121 U. S. 637; Wabash, etc. R. Co. v. Rector, 104, Ill. 296; Johnson v. Detroit, etc. R. Co., 130 Mich. 453; Ricketts v. Chesapeake, etc. R. Co., 33 W. Va. 433; Palmer v. Manhattan, etc. R. Co., 133 N. Y. 261; Smith v. Manhattan R. Co., 45 N. Y. S. 865. Some of the earlier New

of danger that surround the business in which the carrier is engaged. As, for example, the same degree of diligence is not required of the proprietor of a stage-coach or a canal-boat owner as would be required of those using steam or electricity for motive power, and driving their vehicles at a high rate of speed through the streets of crowded cities, or over their tracks in the country; and yet the law requires the same degree of diligence, modified only by the hazards and dangers attending upon the particular undertaking. Proportionately to the hazards of the business is the degree of diligence and care that is required." 47

**§ 635. Depots—Waiting-rooms—Approaches and exits from premises and vehicles.**—The carrier of passengers is not held to that high degree of diligence and care in providing and caring for its depots, waiting-rooms, platforms, docks, approaches and exits as obtains in the operation of its passenger trains, boats or vehicles. Its duty as to the former is to provide a reasonably safe place for the accommodation of those awaiting the arrival or departure of trains or conveyances of the carrier, and reasonably safe approaches and exits to and from their vehicles,

York cases do not hold to this rule, but latterly that court so holds.

47 In *Weisshaar, Adm'x, etc. v. Kimball Steamship Co.*, 128 Fed. 397, 65 L. R. A. 84, the U. S. Ct. Court of Appeals held the owner of a steamship liable for the death of a passenger drowned by the swamping of a boat sent to convey him from the shore to the vessel when the officer in charge of the boat permitted it to attempt the journey in an overloaded condition, although the passengers were guilty of contributory negligence in failing to leave the boat when told that it was overloaded and requested to do so. Cases are collected in the notes and briefs in L. R. A. above cited.

It has been held to be gross negligence for a street car company to run open cars passing each other on tracks which leave

only three inches between the cars, with running rail placed where passengers would naturally rest their arms on the side next to the passing car. *Georgetown, etc. R. Co. v. Smith*, 25 App. D. C. 259, 5 L. R. A. (N. S.) 274—notes and cases cited.

Starting street car while passenger is boarding it. *Clark v. Durham, etc. Co.*, 138 N. C. 77, 50 S. E. 58; *Bedington v. Harrisburg, etc. Co.*, 210 Pa. 648, 60 A. 305; *Hatch v. Philadelphia, etc. R. Co.*, 212 Pa. 29, 61 A. 480.

As to care of an intoxicated person travelling on the platform of a car. *Fox v. Mich. Cent.*, 138 Mich. 433, 5 Am. & Eng. Ann. Cases 68, and cases collected and discussed in note pp. 72, 73, also see discussion on Contributory Negligence of Passenger, notes, p. 72.

taking such precaution for the safety of those using these facilities as would be taken by a reasonably prudent and cautious man under just such circumstances.<sup>48</sup>

<sup>48</sup> In order to bring one in a station house within the protection of the legal duties owing by a common carrier, he must go at a reasonable time, in a proper manner and by the purchase of a ticket or otherwise indicate his intention to become a passenger. *Fremont, etc. R. Co. v. Hagblad*, 72 Neb. 773 (1904), 101 N. W. 1033, 4 L. R. A. (N. S.) 254 and notes citing authorities. Where the plaintiff had done nothing to indicate a purpose to become a passenger. *Hicks v. Union, etc. Co.*, — Neb. (1906), 107 N. W. 798.

*Kirby v. Delaware, etc. Co.*, 46 N. Y. Supp. 777; *Kelly v. Manhattan, etc. Co.*, 112 N. Y. 443; *Buck v. Railway Co.*, 134 N. Y. 589, 31 N. E. 628; *Ill. Cent. R. Co. v. Hobbs*, 58 Ill. App. 130; *Toledo, etc. Ry. Co. v. Grush*, 67 Ill. 262; *Falls v. Railway Co.*, 97 Cal. 114; *Pa. Ry. Co. v. Merriam*, 123 Ind. 415; *Gunderman v. Railway Co.*, 58 Mo. App. 370; *Lucas v. Pa. Co.*, 120 Ind. 205; *Hiatt v. Railway Co.*, 96 Iowa, 169, 64 N. W. 766; *Mo. Pac. Ry. Co. v. Wortham*, 73 Tex. 75. The supreme court of Michigan, in *Mich. Cent. Ry. Co. v. Coleman*, 28 Mich. 440, 447, say: "Except in a very general way, the regulations which safety requires in one case do not very closely resemble those needed in another. It is very plain that presumption of fact may be properly raised under some circumstances, from the nature of the casualty, which could not arise or demand explanation in another. For ex-

ample, where a passenger is quietly seated in a car, and is injured by a collision, or a breakdown, or by the cars leaving the track, there can be no room for any inquiry on the question of contributive negligence. The rule of care and caution to be applied in any case must properly be one required by the nature of the case, and such as the circumstances call for. And, in considering precedents, we can never leave out of view the peculiar circumstances which may or may not require the same conduct necessary in others. Perhaps as neat a statement of this principle as has been given is found in *Blamires v. Lancashire & Yorkshire R. W. Co.*, L. R. 8 Exch. 283. In that case the question was whether a failure of providing means of communication with the persons in charge could be allowed to go to the jury, and there being evidence that such means were well known, and that they might have prevented the mischief, the jury were allowed to consider it. *Brett, J.*, in giving the reasons for his concurrence in that view, said: 'It is an action for negligence, and the plaintiff is bound to prove that the railway company have been guilty of doing something which a railway company of ordinary care would not do, or omitting to do something which a railroad company of ordinary care would do.' And there being evidence that such precautions were customary among companies of ordinary care, he was of opinion

§ 636. *Same subject.*—At what particular time and place the care and diligence increases as the passenger enters upon the premises of and takes passage upon the vehicle of the carrier, or where it lessens as the passenger alights from the vehicle and leaves the premises, it is difficult to state. In determining this, regard must at all times be had to the surroundings.<sup>49</sup> For example, a passenger leaving a steamboat may be in very great peril in crossing the gang-plank, and in the same peril in taking passage; the coach proprietor may land his passengers in a very unsafe and dangerous place; the railroad company may unload its passengers among tracks and switches and running engines, or upon a platform which is comparatively safe and apart from any of the dangers of its business. The degree of care must, as we have often said, be dependent upon the hazards and dangers that must necessarily be encountered by the passenger.

the case was one for the jury. And Grove, J., said: 'If a particular precaution has not been hitherto known or used, or if its use is obscure, the omission of it is not negligence; but if it is used to any considerable extent, that changes the case, and makes the omission some evidence of negligence.' The degree of care required in any business must be proportionate to its nature and risks, and the business of railroads is one of great risks and requiring great caution. But the law cannot require business to be conducted upon an unusual basis. It is only experience and advancing knowledge that enable remedies to be adopted for dangers that have not been so common or serious in their consequences as to turn attention to their removal. And changes in methods of doing business, or differences of method between different parties engaged in it, are quite as likely to imperil safety by the uncertainty and perplexity to which all persons would be exposed as the failure of any one to adopt some

possible safeguard that has not usually been adopted. All rules applied must be reasonable and not oppressive, and must be applied with reference to the ordinary conduct of affairs. Every one has a right to expect that railroads will be managed according to the common custom, and railroad companies have a right in their turn to expect conformity to this. Every person dealing with them has his own duties to perform in harmony with theirs." *Cross v. Lake Shore R. Co.*, 69 Mich. 363; *Cooley on Torts*, 605, 607; *Cotant v. Boon, etc. Ry. Co.*, 125 Iowa, 43, 69 L. R. A. 982 and notes and cases cited.

<sup>49</sup> From the time the passenger places himself under the charge of the carrier as he begins his journey until he is offered the opportunity to leave the premises of the carrier at its termination he is a passenger, unless by some act not attributable to the carrier the relation ceases. *Fremont, etc. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033.

§ 637. **Overloading and overcrowding vehicles.**—The carrier is not only bound to furnish conveyance for all who apply, subject to the few limitations noticed, but he must furnish safe and reasonably comfortable accommodations. By a system of inspections and licenses, the carriage by steamboats is regulated as to the number they are permitted to carry; but while there is no legal restrictions fixing the number that coaches and railroads shall carry, it is well settled that they should convey only what their vehicles will reasonably accommodate. Where it appears that the carrier company had admitted passengers upon its cars until all the seats were taken and passengers were compelled to stand up in the aisles and on the platforms of the cars, and that the plaintiff, while standing on the platform, was thrown off and injured, a judgment for the plaintiff was sustained upon the theory that the jury might find from the circumstances that the carrier was guilty of negligence in overloading the cars.<sup>50</sup> Where

<sup>50</sup> *Trumbull v. Ericson*, 97 Fed. 891; *Graham v. McNeal*, 55 Pac. (Wash.) 63; *Chesapeake & Ohio v. Clowes*, 93 Va. 189, 24 S. E. 833.

In *Lynn v. Southern P. R. Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710, where the plaintiff a passenger was unable to find room inside a car and therefore stood upon the platform, from which he was thrown and injured, in affirming the judgment for the plaintiff the court said: "The defendant should not have allowed so many passengers to have gone upon its cars, and if it was unable to prevent them from so doing, it had the right to refuse to move the train under such circumstances; but if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platform, it was under obligation to exercise the additional care commensurate with the perils and danger surrounding the passenger

by reason of the overcrowded condition of the cars." *Weishaar, Adm'x, etc. v. Kimball Steamship Co.*, 128 Fed. 397, 65 L. R. A. 84, and see briefs and notes in *L. R. A. Rep.* cited, *Alton, etc. Co. v. Oller*, 217 Ill. 15, 75 N. E. 419, 4 L. R. A. (N. S.) 399.

In case of overcrowded and overloaded street cars question of negligence left to jury. *Jacobs v. West End R. Co.*, 178 Mass. 116, 59 N. E. 639; *Burns v. Boston Elev. R. Co.*, 183 Mass. 96, 66 N. E. 418. It has been held to be negligence to carry on street cars a number of persons greatly in excess of the car's capacity, so that passengers are compelled to stand on the platform and steps, and to load them beyond any reasonable and proper limit it has been held to be gross negligence. *Pray v. Omaha St. Car Co.*, 44 Neb. 167, 48 Am. St. Rep. 717, 62 N. W. 447; *Richmond, etc. Co. v. Garthright*, 92 Va. 627, 32 L. R. A. 220, 53 Am. St. 839; *Bumbear*

one upon a crowded street-car found standing room upon the front platform, where he was compelled to stand with one foot upon the step and the other upon the platform, holding on by his hands, and while riding in this way a movement of the persons upon the platform with him caused him to lose his hold, which he was unable to regain, and by the pressure of the crowd he was forced off the car, falling under the wheels which crushed his left leg, rendering amputation necessary, it was held to be a question of fact whether such overcrowding of the car was negligence. The court say: "The exposure of a passenger to danger, which the exercise of a reasonable foresight would have anticipated, and due care avoided, is negligence on the part of the carrier; that it may not be held, as matter of law, that the exercise of a reasonable foresight will not lead a street railway company to anticipate that overcrowding of its cars and their platforms will render accidents to passengers probable; but the question whether it is chargeable with negligence in permitting such overcrowding is one of fact."<sup>51</sup> Where one entered one of the carrier's regular trains which was about to start, and, before he learned he could not get a seat, the train was going at a high rate of speed, and on being asked the conductor refused him a seat, whereupon, his fare being demanded, he offered to pay if a seat was furnished, but refused if it was not, it was held that he had a right to refuse payment of fare, and by so doing he did not become a trespasser on the train, for a passenger has a right to be provided with a seat.<sup>52</sup> The court, in the course of the opinion, say: "It is, in general, the duty of a railroad company to provide sufficient cars to carry all who have occasion to travel on its line of road. As the law does not require unreasonable things, a single instance, or occasional instances, of insufficiency in the amount of means to travel, caused by a rush of travel

v. United Traction Co., 198 Pa. 198, 47 Atl. 961. *McCaw v. Union Traction Co.*, 205 Pa. 271, 54 Atl. 893. Passenger thrown from overcrowded car going around curve. *Hess v. Meriden, etc. Co.*, 75 Conn. 571, 54 Atl. 299; *Zimmer v. Fox, etc. Co.*, 118 Wis. 614, 95 N. W. 957; and see notes and cases collected, 4 L. R. A. (N. S.) p. 399

<sup>51</sup> *Lehr v. S. & H. R. Ry. Co.*, 118 N. Y. 556; *West Chicago, etc. Co. v. McNulty*, 64 Ill. App. 549.

<sup>52</sup> *Hardenberg v. St. Paul, etc. R. Co.*, 39 Minn. 3; *Louisville, etc. Ry. v. Patterson*, 69 Miss. 421. See also the last above case as reported in 22 L. R. A. 259, with notes of cases.

not reasonably to be expected by the company, would probably be excused; and the railroad company, like all other common carriers of passengers, must provide those whom it carries with the usual reasonable accommodations for comfort in traveling, including seats. This is too well established to need citation of authorities." The consensus of the authorities seems to be that while it is the duty of the common carrier of passengers to furnish reasonable accommodations for their passengers, which would include seats in their passenger cars, unless it should be upon some unexpected occasion when there was a great rush of travel, the passenger would not be upheld in refusing to pay his railroad fare, unless he was upon the train and could not leave it, but would have the option to continue the journey or to leave the train at the first opportunity, and being compelled to thus leave the train might have an action against the carrier for whatever damage resulted therefrom. The authorities also held that if the passenger, because of overcrowded trains, is compelled to violate some of the reasonable regulations of the company, like standing upon the platform, and while doing so is injured, he will not be held to be guilty of contributory negligence, and the carrier may be held liable for any damage that results from an injury received at such a time if it should be found that the overloading or overcrowding of the train was negligence upon the part of the carrier; and the same liability may be said to attach to street-car companies, or to any other carrier of passengers.

§ 638. **Liability of carrier for abuse of passengers.**—The passenger is entitled to protection from assaults or abuse from the carrier and his servants, and also from fellow passengers and even strangers. While a passenger, he is to a certain extent under the control of the carrier and at all times entitled to his protection.<sup>53</sup> The passenger is invited to occupy the waiting-rooms

<sup>53</sup> *Brown v. Chicago, etc. R. Co.*, 139 Fed. 972, 2 L. R. A. (N. S.) 105. It was held in this case that the liability of defendant carrier for injury of plaintiff passenger by a fellow-passenger depended upon evidence showing that the employees of defendant carrier knew or ought by exer-

cise of due care to have known from the attendant facts and circumstances, that the injury was threatened or impending and that by the exercise of the high degree of care required of carriers, could have been avoided.

In the note in L. R. A. report cited, several cases are collected

of the carrier, is required to travel over the way prepared by him in order to take passage upon his conveyance, and, if he be conveyed, has no choice as to the time or manner except as to the several hours at which the carrier departs, or of the conveyances employed. Where the plaintiff boarded the platform of a baggage car on the carrier's road to ride to a place where the cars were being backed to make up a train, the carrier's order forbidding all persons except certain employees to ride on the baggage cars, and directing baggagemen to rigidly enforce the rule, and where, as it appeared, the carrier's baggageman ordered the plaintiff off while the car was in motion, and the plaintiff replied that he could not get off because of a pile of wood near the track, whereupon the baggage-master of the carrier kicked him off and he fell against the wood and then under the car and was injured, in an action to recover damages it was held that the fact that the plaintiff was a trespasser was no defense, and that the evidence was sufficient to authorize the submission of the defendant's liability to a jury; and the court refused to disturb a judgment which had been obtained by the plaintiff.<sup>54</sup> The court in the opinion say: "It is, in general, sufficient to make the master responsible that he gave to the servant an authority, or made it his duty, to act in respect to the business in which he was engaged when the wrong was committed, and that the act

showing the different doctrines held upon this subject. One line of cases holding that the carrier will be held to the same high degree of diligence that is required of him in providing suitable safe machinery, while another class hold that he will be held to ordinary diligence only. *Britton v. Atlanta, etc. R. Co.*, 88 N. C. 563, 43 Am. 749; *Exton v. Central, etc. R. Co.*, 63 N. J. L. 356, 56 L. R. A. 508, 46 Atl. 1099; *Chicago, etc. R. Co. v. Pillsbury*, 123 Ill. 9, 15 Am. St. Rep. 583. Where there was nothing to warn the R. R. company's employees of the possibility of an assault the company is not liable. *Felton v. Chicago, etc. R. Co.*, 69

*Iowa*, 580, 29 N. W. 618; *Mullen v. Wisconsin, etc. Co.*, 46 Minn. 474, 49 N. W. 249.

But where the carrier knows or has opportunity to know, of a threatened injury, and proper precautions are not taken, company is liable. *Savannah, etc. R. Co. v. Boyle*, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104; *Nashville, etc. R. Co. v. Flake*, 114 Tenn. 671, 88 S. W. 326.

Whether duty of conductor to disarm drunken passenger who is firing blank cartridges a question for jury. *McWilliams v. Lake Shore, etc. R. Co.*, 146 Mich. 216, 109 N. W. 272.

<sup>54</sup> *Rounds v. Del. etc. Ry. Co.*, 64 N. Y. 129.



complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another. But it is said that the master is not responsible for the wilful act of the servant. This is the language of some of the cases, and it becomes necessary to ascertain its meaning when used in defining the master's responsibility. . . . It seems to be clear enough from the cases in this state that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. If he is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a wilful and wanton wrong and

trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders."

So an express company was held liable for the acts of its agents for cursing, abusing and maltreating the plaintiff immediately after refunding to him certain overcharges which he had come to the office to obtain, and the delivery of a receipt therefor. It was held that this treatment was a part of the *res gestæ*, and that the company was liable for the tort.<sup>55</sup> "The law is well settled that it is the duty of the common carrier to use the highest degree of care reasonably practicable in exercising police power to protect its passengers from insult and injury by fellow passengers."<sup>56</sup>

In *St. Louis v. Myer*<sup>57</sup> it was held that it is the first and highest duty of the conductor of a railroad train, knowing, or having reason to believe, that a passenger is a dangerous lunatic, to take proper action at once for the security of the other passengers against his violence, and, failing to discharge such duty, to communicate to the other passengers the facts within his knowledge showing, or tending to show, that they are riding in a car with a violently insane man under no guard or restraint, to the end that they may themselves take suitable precautions for safety. It has also been frequently held that not only is it the duty of the carrier to protect its passengers against insane persons, but also to

<sup>55</sup> *Richberger v. American Ex. Co.*, 73 Miss. 161, 31 L. R. A. 390; *Dwinnelle v. N. Y. Cent. R. Co.*, 120 N. Y. 117, 8 L. R. A. 224; *Wise v. Covington, etc. Street Car Co.*, 95 Ky. 537; *Conger, etc. v. St. Paul, etc. R. Co.*, 45 Minn. 207; *Baltimore & Ohio Ry. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220; *Texas & P. Ry. Co. v. Williams*, 23 U. S. App. 379, 62 Fed. 440. A railroad company was made liable for an assault made upon a passenger by its conductor. *Luhrs v. Brooklyn Heights R. Co.*, 42 N. Y.

Sup. 906. A carrier who permits passengers to wait in its depot for trains is liable to one who, after purchasing a ticket, is waiting, and is indecently assaulted by its station agent. *Griffith v. Railway Co.*, 94 N. W. 168.

<sup>56</sup> *Lucy v. Chicago, etc. R. Co.*, 64 Minn. 7, 31 L. R. A. 551; *Mullen v. Wis. Cent. R. Co.*, 46 Minn. 474.

<sup>57</sup> 10 U. S. App. 677, 4 C. C. A. 221, 54 Fed. 116; *St. Louis, etc. R. Co. v. Greenthal*, 23 U. S. Ct. Ct. Ap. 100.

protect them against drunken passengers, or those persons who are liable to inflict abuse or assaults upon them. And where the carrier has failed to do its duty in this respect, knowing the situation from its servants or agents, they have been held liable for damages resulting from such treatment.<sup>58</sup> But where a person was murdered in a sleeping-car by some intruder, stranger, or fellow passenger, it was held that the carrier was not liable if he did not know, or his employees did not know, of an impending danger, and there were no circumstances to arouse their suspicions.<sup>59</sup> The court say: "Carriers are paid to preserve watch and ward over their sleeping guests, and they are rightfully held to a due and faithful discharge of the obligations thus assumed." But say the court: "It (the carrier) cannot be deemed to have anticipated or be expected to guard and protect its passengers against a crime so horrid and happily so rare as that of murder. . . . To do so would be to require of them more than human foresight as to the minds and motives of men, and make them, indeed, insurers of the safety of passengers while under their care against all dangers, however remotely connected with their acts of omission or commission."

In this connection the court quote from *Batton v. Railroad Co.*,<sup>60</sup> where it was held that while it was the duty of a railroad company as a common carrier to protect its passengers against violence or disorderly conduct on the part of its own agents or other passengers and strangers when such violence or misconduct may be reasonably expected and prevented, yet it is not liable to an action for damages for a wrong when it is not shown that the company had notice of any facts which justified the expectation that a wrong would be committed; and the court say in its opinion, "that all the cases upon the subject impose the qualification that the wrong or injury done the passenger by such strangers must have been of such a character and perpetrated under such circumstances as that it might reasonably have been anticipated or naturally expected to occur."

**§ 639. Fares—Tickets—Contracts for carriage.**—The contract, express or implied, by which the carrier transports the

<sup>58</sup> *Rommel v. Schanbacher*, 120 Ill. Cent. R. Co. v. *Minor*, 69 Miss. Pa. St. 579; *Richmond & Co. v. Jefferson*, 89 Ga. 554, 17 L. R. A. 571; *Myer v. St. Louis, etc. R. Co.*, 54 Fed. 116. See also notes, Ill. Cent. R. Co. v. *Minor*, 69 Miss. 718, 16 L. R. A. 627.  
<sup>59</sup> *Ball v. Chesapeake & Ohio Ry. Co.*, 93 Va. 44, 32 L. R. A. 792.  
<sup>60</sup> 77 Ala. 591, 54 Am. Rep. 80.

passenger is one for hire. He is bound to carry the passenger who presents himself for carriage, provided he is a proper person and entitled to become a passenger and pays the reasonable price charged. As evidence of this payment the carrier may, and generally does, issue to the passenger a ticket which entitles him to transportation between the points named, or issues to him a mileage ticket or coupon ticket entitling him to carriage for the number of miles or trips, as the case may be. A ticket like a bill of lading may be said to be both a receipt for the payment of the fare and at the same time a contract for conveyance of the passenger according to its terms.<sup>61</sup> And here it may be remarked that fair and honest dealing on the part of both the carrier and the passenger is demanded. The carrier company will be held to a strict performance, upon its part, of the contract it makes, and if upon its tickets it uses ambiguous language as to any conditions or agreements, it will be construed favorably to the passenger and against the carrier. The payment of fare is an important element in the contract for carriage. It is the consideration which induces the undertaking upon the part of the carrier. The ticket is evidence of its payment. The amount charged must be reasonable, and is generally regulated by statutes in the different states, and sometimes fixed in the charters that are issued to the carrier companies. So, the carrier cannot charge more than the reasonable amount allowed by the statute or its charter, but may charge a less amount if the charge is general and not discriminated; therefore the carrier often writes or prints into his ticket conditions and agreements, basing them upon the consideration that the ticket is sold at a reduced rate of fare, and this consideration is held to be a valuable consideration and sufficient to support such agreements, except agreements so limiting the liability of the carrier as to

<sup>61</sup> Special stipulation written into the ticket that it is not transferable is binding. *Schubach v. McDonald*, 179 Mo. 163, 65 L. R. A. 136. See notes and brief in L. R. A. cited.

But carrying a passenger at a reduced rate does not entitle a company to stipulate for an exemption from liability for negli-

gently injuring him. *Pittsburg, etc. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Crary v. Lehigh Valley R. Co.*, 203 Pa. 525, 59 L. R. A. 815, 93 Am. St. Rep. 778.

Ticket containing no limitation as to time may be used at any time. *Freeman v. Atchison, etc. R. Co.*, 71 Kan. 327, 80 Pac. 592.

excuse him for his own negligence. And so it has been held that conditions in a round-trip excursion railroad ticket stipulating that it shall be used only by the original purchaser, and requiring him to identify himself as such at the point of destination before beginning the return passage, is not unreasonable or invalid.<sup>62</sup> And where a railroad ticket was sold at a reduced rate in consideration of certain conditions, among others, that it should be stamped by the company's joint agent at the place of departure before it would be accepted for the return passage, it was held "the condition was reasonable, and one failing to have the ticket stamped was not entitled to passage thereon."<sup>63</sup>

The court say: "The theory upon which unusual terms in excursion tickets are upheld is that (1) they are sold at reduced rates of fare and not at the usual or ordinary rates. (2) They are sold for special occasions and not for ordinary and unlimited use. (3) By accepting such ticket when he has the option to

<sup>62</sup> *Dangerfield v. Atchison, etc. R. Co.*, 62 Kan. 83, 61 Pac. 405.

<sup>63</sup> *Watson v. Louisville, etc. R. Co.*, 104 Tenn. 194, 49 L. R. A. 454, citing *Mosher v. Railway Co.*, 127 U. S. 390; *Boylan v. Railway Co.*, 132 U. S. 146; *Edwards v. Railway Co.*, 81 Mich. 364. In *Edwards v. Railway Co.*, a round-trip ticket from Lansing to Chicago was sold at a reduced rate. Conditions were printed upon the back of the ticket, and one of the conditions was that the ticket should not be good to return unless the passenger identified himself to the ticket agent at Chicago, and produced his stamp upon the ticket and himself signed it. These conditions were signed by the passenger; he, however, failed to identify himself to the ticket agent at Chicago when ready to return and obtain the stamp required, but succeeded in boarding the train, but not by the usual way of passing the gate-keeper. His ticket was refused; he was finally put

off the train and afterwards brought an action for damages. Judge Champlain in the opinion said: "Parties capable of contracting may enter into such agreements as they choose, and if they rest upon a sufficient consideration, and are not void for illegality, nor as being against public policy, they are binding upon them. The contract of carriage in this case, including the conditions, was a valid and binding agreement. The conditions were reasonable and rested upon a sufficient consideration, namely, the reduced rate of fare." In *Eastman v. Maine Cent. Ry. Co.* 70 N. H. 240, 46 Atl. 54, it was held that "a condition on which a mileage book is purchased of a carrier—that, if presented by another than the person to whom it was issued, it shall be forfeited—is valid." *Louisville, etc. Co. v. Wright*, 47 N. E. 491; *Acton v. Castle Mail-packet Co.*, 73 L. T. 158; *Thompson v. Trusdale*, 61 Minn. 129.

purchase the usual and ordinary ticket, the passenger enters into a contract with the carrier different from that implied by law upon the purchaser of an ordinary ticket at full rates of fare. (4) The purchaser is bound in such cases by the terms of the contract. He is entitled to its advantages of reduced fare, and is bound by reasonable regulations for its use. . . . It is equally for the benefit of the carrier and the public that the right to make these special contracts, when reasonable, should be upheld and enforced. Large numbers of passengers take advantage of excursion rates who would otherwise not be able or willing to travel at all. People of limited means most generally avail themselves of these reduced fares, and do so with the full expectation that they will be subjected to requirements and inconveniences that they would not meet on ordinary occasions when paying full fare. On the other hand, carriers reap a benefit from them in increased travel with increased receipts though not the usual profits. It is not consistent with public policy to so restrict and hamper the use of such tickets as to prevent the running of excursions and the granting of such rates. To do so would be to deprive persons of limited means of the opportunities for travel which they desire."

It has been held, however, that provisions or conditions printed upon the face of a passenger's return-trip ticket, to the effect "that it will not be valid from the return journey unless stamped by the agent of the company at the place from which the return journey is authorized, forms no part of the contract between such purchaser as a passenger and such company as a carrier, and does not qualify the usual rights and obligations of either if such purchaser does not assent to such conditions before or at the time he purchases such ticket." <sup>64</sup>

§ 640. **Where the carrier or agent is at fault.**—Thus far we have noticed cases where the passenger was at fault in violating the conditions of the contract. But where the violation of the contract is attributable to the fault of the carrier or his agent the rule is very different. As where a passenger had purchased a round-trip ticket, and on it was the condition that he was to present it to the agent at the terminus of his trip, sign the ticket in the agent's presence, and procure it to be stamped by the

<sup>64</sup> Lake Shore & Mich. S. Ry. Co. v. Mortal, 8 Ohio Dec. 134.

agent in order to make it valid for use on his return trip, and the passenger did present himself at the ticket office, did sign his name to his ticket in the presence of the agent, and gave it to the agent, who took it to the rear end of his office, and afterwards returned with it folded and handed it with a sleeping-car ticket to the passenger, but after the passenger had proceeded for a distance upon his return trip it was discovered that the ticket was not stamped, and the passenger for this reason was ejected from the train, it was held, in an action for damages, that the company was liable.<sup>65</sup> The court say in discussing this principle: "It has been held that it is a reasonable regulation upon the part of the company to require passengers getting upon its railroad train without a ticket to pay additional fare; but in this connection the court declare that a reasonable opportunity must be given to the passenger to enable him to purchase the ticket; that if the passenger fails to purchase a ticket solely on account of the premature closing of the ticket office, or of the failure of the company to have an office for the sale of tickets, he cannot be required to pay additional fare, and if expelled for the non-payment of the additional fare, after paying or offering to pay the regular fare, he is entitled to recover damages for the expulsion."<sup>66</sup> The reason given is, that to allow a railroad company to enforce its rule for additional fare under such circumstances would be punishing the passenger for the railroad company's neglect of duty. Unless the railroad company furnishes the necessary conveniences or facilities for procuring tickets, the passenger cannot be considered to be in any manner at fault.

The authorities have not been entirely harmonious as to the liability of carriers in cases where the passenger has been ejected from the train for the reason that he did not hold the proper ticket or return coupon, which was the occasion of the mistake or the result of negligence of the agent or servant of the company. As where the agent delivered to the passenger seeking to purchase a ticket by a particular route, a ticket for some other

<sup>65</sup> *Northern Pac. Ry. Co. v. Co.*, 16 Oreg. 261; *State v. Pauson*, 70 Fed. 585, 30 L. R. A. 730. *Hungerford*, 39 Minn. 7; *Everett v. Chicago, etc. Co.*, 69 Iowa, 15,

<sup>66</sup> *Pool v. Northern Pac. Ry.* 58 Am. Rep. 207.

or different route which when presented for passage was refused by the conductor of the train with a demand that the passenger pay his fare and upon refusal to do so the passenger was ejected from the train; or when the passenger held a return ticket made up of coupons one for the going trip and the other for the return, on presenting it for passage on the going trip the conductor took up the wrong coupon leaving with the passenger the coupon for the going trip, which being presented for return passage was refused; or where the passenger being entitled to a stop over ticket, on his request, by mistake or negligence of the conductor of the carrier's train is furnished with transportation that is invalid by the rules and regulations of the company and is refused by the train conductor to whom he presents it on resuming his journey.

Some of the authorities in considering these cases, and it may be said to be quite general, distinguish between the liability of the carrier resulting from the negligence or mistake of their agent and the duty of the conductor to obey the rules and regulations of his company. That is to say, the liability of the carrier may in some instances result from the conductor doing his duty as well as in other cases where there is failure to do his duty; and so it does not always follow that because the conductor has done his duty in ejecting a passenger the company is not liable on its contract for carriage.

It is settled by the great weight of authority that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company.<sup>67</sup> The reason for this, as is said in *Paulin v. Canadian Pacific*,<sup>68</sup> is found in the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collecting its fares. The conductor cannot decide from the statement of the passenger what his verbal contract with the ticket agent was, in the absence of the counter

<sup>67</sup> *Western Maryland R. Co. v. R. Co.*, 48 Mo. App. 125; *New Stockdale*, 83 Md. 245; 34 Atl. 880; *York, etc. R. Co. v. Bennett*, 50 *Frederick v. Marquette, etc. R. Fed.* 496. 1. C. C. A. 544.  
<sup>68</sup> 52 Fed. 197, 3 C. C. A. 23, 17  
 Co., 37 Mich. 342, 26 Am. Rep. L. R. A. 800.  
 531; *Woods v. Metropolitan, etc.*



evidence of the agent. To do so would take more time than a conductor can spare in the proper and safe discharge of his manifold and important duties and it would render the company constantly subject to fraud and consequent loss. The passenger must submit to the inconvenience of either paying his fare or the ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent. There is some conflict among the authorities, but the great weight of them is in favor of the result here stated.<sup>69</sup>

It is the duty of the passenger to exercise ordinary diligence and if by doing so he can discover the mistake of the agent or conductor, furnishing the proper evidence of his right to transportation, and can correct the error but fails to do so, then if on presentation of his ticket or evidence of his right to transportation it is refused and he is ejected from the train he cannot recover as the ejection is not the approximate cause of the mistake or wrongful act of the agent or conductor furnishing the ticket or negligently making the mistake.<sup>70</sup> And in such case it has been said it matters not whether the action sounds in tort or in contract. If in tort, then the rule is that he cannot recover any damages for an injury growing out of the negligence of the defendant carrier and which by the use of due care he might have avoided. If in contract, then it was his duty to use due diligence to reduce the damages for the breach. A failure to do so would prevent recovery for any damages which might by the exercise of such diligence have been avoided. So if by due diligence the mistake was discovered but too late to be rectified then

<sup>69</sup> *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Towsend v. New York Cent. & H. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Frederick v. Marquette, H. & O. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Shelton v. Lake Shore & M. S. R. Co.*, 29 Ohio St. 214; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. 432, 10 Am. Rep. 711; *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; *Chicago B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Hall v. Memphis & C. R. Co.*, 15 Fed. Rep.

57; *Pennington v. Philadelphia W. & B. R. Co.*, 62 Md. 95; *Johnson v. Philadelphia W. & B. R. Co.*, 63 Md. 106. *Mahony v. Detroit St. R. Co.*, 93 Mich. 612, 53 N. W. 793, 32 Am. St. Rep. 528, 18 L. R. A. 335; *Virginia, etc. R. Co. v. Hill*, 105 Va. 729, 6 L. R. A. (N. S.) 899; *Yorton v. Milwaukee, etc. R. Co.*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23; *McKay v. Ohio R. Co.*, 34 W. Va. 65, 9 L. R. A. 132 and note.

<sup>70</sup> *Wiggins v. King*, 91 Hun (N. Y.) 340, 36 N. Y. Sup. 768.

the passenger must do whatever he can reasonably do to minimize the damages that might result from it, which would generally be the amount of fare he was required to pay to avoid being ejected from the train.<sup>71</sup>

<sup>71</sup> *Brown v. Rapid Ry.*, 130 Mich. 483; *Hufford v. G. R. & I. Ry Co.*, 53 Mich. 118-121 and the Michigan case collected and cited in a note to the opinion.

In *Van Dusan v. Railroad Co.*, 97 Mich. 439-441 the court say: "The plaintiff on discovering that the ticket which he had received from the company's agent had been wrongfully taken up by the first conductor without furnishing him the requisite evidence to his right to ride from Port Huron to Trenton, had no right to insist upon riding upon the Trenton train without producing any evidence of his right. To hold otherwise would be to incite unseemly contests. The rule requiring the production of a ticket as evidence of the right to ride is reasonable, and is one with which it must be assumed the traveling public is familiar. In the present case the failure of the former conductor to furnish plaintiff a check was evidently a mistake, and the plaintiff, without discovering the mistake, had taken his seat in the train from Port Huron to Trenton, he at the time not possessing any evidence of his right to ride. Upon discovering this mistake, his remedy was not by insisting upon a further breach of duty or the rules of the company by the conductor in charge of the Trenton train. On the contrary, it was his duty to leave the train peaceably or pay his fare, and to seek his remedy for

damages resulting from either necessity as the situation of the time required."

In *N. Y. L. E. & W. R. Co. v. Winter*, 143 U. S. 60, where a passenger attempted to ride on a stop over privilege, having an unlimited ticket which was punched by the first conductor but which did not invalidate it, and was forcibly ejected from the train, the company was held liable, the court observing: "The reason of such rule is to be found in the principle that when a party does all that he is required to do under the terms of a contract upon which he has entered and, is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract.

In *Northern Pacific v. Pauson*, 70 Fed. 585, 30 L. R. A. 730, it was held that the failure of the carrier's agent to stamp the return coupon of a round trip ticket in order to make it valid for use under the carrier's regulations, will not justify the expulsion from a train of the passenger who presented himself to the agent and signed the ticket in the agent's presence and delivered it to and received it from the agent under such circumstances as to justify the belief that the ticket had been stamped. And in *Scofield v. Pennsylvania Co.*, 50 C. C. A. 553, 112 Fed. 855.

§ 641. — **Exhibition and surrender of tickets.**—There are certain regulations not binding merely because they are a part of the contract, but made effective and of force because they are considered to be reasonable, just and necessary in order to carry out the obligations of the carrier company to the public. Among

56 L. R. A. 224 it was held that the non-possession of a ticket does not of itself authorize the ejection from a train of a passenger who having a contract for stop over privileges exercises them after his ticket has been taken up against his protest and demands to complete his journey without procuring another ticket, the courts say: "The company could not absolve itself from the obligation of its contract by wrongfully seizing and withholding the evidence of it. There are authorities which hold that a passenger may not enter a train for carriage without a ticket purporting to give him the right to be carried and refuses to pay the fare relying upon some agreement resting in evidence which the conductor cannot consider. This holding rests upon the impracticability of the conductor's deciding such questions from the lack of time to tend to such duty and the lack of opportunity to hear the other party. All cases referred to, therefore, hold that in such a situation the passenger should pay his fare and settle the question of his right with the company.

And it has been held that if the conductor by mistake fails to collect the full amount of the fare, he may afterwards demand more and upon the refusal to pay for transportation beyond that already paid for, he may eject the passenger. *Curties v. Louisville,*

*etc. R. Co.,* 94 Ky. 573, 23 S. W. 363, 21 L. R. A. 649; *Wardell v. Chicago, etc. R. Co.,* 46 Minn. 514, 13 L. R. A. 596, 49 N. W. 206; *McCarthy v. Chicago, etc. R. Co.* 41 Ia. 432.

And if a passenger by his own mistake without the act of the carrier takes the wrong train he is not entitled to transportation to the next stopping place and if he refuses to pay, may be ejected. *New York, etc. R. Co. v. Feely,* 163 Mass. 205, 40 N. E. 20; *Columbus, etc. R. Co. v. Powell,* 40 Ind. 37.

And it has been held the wrongful expulsion of a passenger who had no ticket because it had been taken up by another conductor renders the carrier liable. *Sloane v. So. Cal., etc. R. Co.,* 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. If a carrier uses more force than necessary, he is liable in tort. *Virginia, etc. R. Co. v. Hill,* 105 Va. 729. Where one with full knowledge of circumstances contracts with conductor on a special train made up to go to and return from a wreck and pays fare going, he has no right of action against the company for refusal of transportation to return. *DuBose v. Louisville, etc. R. Co.,* 121 Ga. 308, 48 S. E. 913.

Statement of railroad agent that conductor would allow transportation, *etc. Texas, etc. R. Co. v. Smith* (Tex. Civ. App. 1905), 84 S. W. 852.

Failure of company to give re-

these may be mentioned the requirement that passengers will not be permitted to board the trains or boats or vehicles until they have passed through the gate separating the vehicles from the public waiting-rooms and had their tickets punched by the gate-keeper. This is a necessary and important regulation, especially at large city stations where trains are made up and numerous passengers are admitted for carriage, or where great steamboats are loaded with passengers. It necessarily facilitates the work that must be done, and in most cases, it may be said, makes it possible for the carrier to perform more efficient and better service. The carrier may enforce such a regulation and prevent its violation.<sup>72</sup> The regulation, too, that a passenger is bound to show his ticket to the person who is in charge of the vehicle, is held to be a reasonable one.

§ 642. — **Lost or mislaid tickets.**—As we have seen, the regulation that a passenger must produce and show his ticket when called for is not only reasonable, but it is without doubt a necessary regulation in order to facilitate the business and make it possible for the carrier to transport the passenger. And where a passenger has lost or mislaid his ticket, and cannot produce it when called upon, after having been given a reasonable time to find it and produce it, he may be required to pay his fare or be expelled from the train or the vehicle. While this regulation may in some instances work a great hardship, it is evident that as a general rule it is necessary, otherwise it would open the door for fraud or deception, and the carrier would necessarily suffer for want of it. And so it has been held that a rule requiring the conductor to eject from the train a passenger who refuses to produce a ticket or pay his fare on demand is a reasonable one, and the purchaser of a non-transferable commutation ticket, who has lost it, and refuses on account of such loss to pay his fare upon the train, falls within the rule, and cannot

turn transportation on account of strike. *Elliott v. Southern Pac.*, 441, 79 Pac. 420.

Where the carrier's agent wrongfully refused to indorse a return trip ticket and the passenger in consequence was ejected from the train, it was held, that

he was entitled to recover for his expulsion, that it was not incumbent on him to purchase a ticket or pay his fare. *Texas Pac. R. Co. v. Payne (Tex.)* 87 S. W. 330.

<sup>72</sup> *Dickerman v. Union Depot Co.*, 44 Minn. 433.

maintain an action of tort against the company to recover damages for being ejected by the conductor for non-compliance with it.<sup>73</sup>

§ 643. — **Stop-over tickets—Time limit—Train limit, etc.** The presumption is, that when a passenger purchases a ticket he will use it at once, or within a reasonable time, and make a continuous journey; and so it has been held that it is a reasonable regulation that a passenger, if he would stop over between the points for which he is ticketed, must, if his ticket is limited, surrender it and obtain a stop-over check or ticket; that the carrier may limit the time the ticket will be good, and the train or class of trains upon which it will be taken. Where a passenger boards a train upon a ticket which he knows does not, upon its face, entitle him to passage because the time for which it purports to be valid has expired, even though he thinks the limitation unreasonable, and is ejected from the train for refusing to pay fare, he cannot in an action recover damages, nor is he entitled to have the price refunded. In such a case the court say: "By not using the ticket within the time fixed by it, his rights under the ticket were at an end, and, before he could rightfully claim a passage, he must obtain a ticket entitling him to one. For that purpose he should apply to the agent of the company authorized to issue tickets, and there urge his claim, if such he had, to a ticket, because of his former payment, and not attempt its adjustment with the conductor, whose duty it was to take up and cancel, and not to issue, tickets. Had he not presented the ticket, but claimed a passage because, more than a year before, he had purchased one, and had not used it, we assume no one would contend that he was entitled to a passage, and why? Because public policy, as well as public sentiment, would condemn a rule so palpably unreasonable."<sup>74</sup> If because of the fault of the car-

<sup>73</sup> Crawford v. Railway Co., 26 Ohio St. 580; Hibbard v. Railway Co., 15 N. Y. 455; Cooper v. Railway Co., L. R. 4 Exch. Div. 88. As to the passenger having reasonable time to find his ticket before being ejected from the

train, see Maples v. Railway Co., 38 Conn. 557.

<sup>74</sup> Trezona v. Railway Co., 107 Iowa, 22, 43 L. R. A. 136; Bradshaw v. Railway Co., 135 Mass. 407, 46 Am. Rep. 481; McKay v. Railway Co., 34 W. Va. 65, 9 L. R. A. 132.

rier the passenger cannot comply with the conditions, he will not forfeit his ticket.<sup>75</sup>

§ 644. **Tickets over connecting lines.**—These tickets are usually issued with coupons attached for each connecting road or carrier, and unless by contract it appears otherwise it will be held that the initial carrier in the sale of such a ticket is acting as the agent of the connecting carrier.

But it cannot be said that there is entire harmony among the courts of the several states as to the liability for loss or injury to the passenger, riding on such ticket, suffered upon the line of the connecting carriers by reason of their fault or negligence. There is a line of cases holding the rule to be as expressed by the court in the case of *Pennsylvania Company v. Loftis*.<sup>76</sup> "As to a

<sup>75</sup> In *Drew v. Cent. Pacific Ry. Co.*, 51 Cal. 425, it was held that "if a passenger who has purchased a ticket from a railroad company, which is silent on the subject of his stopping over, stops over before he reaches the point to which the ticket entitled him to ride, he cannot resume his journey on the ticket; that if the passenger leaves the train before he has arrived at the point to which his ticket entitled him to ride, he voluntarily terminates his contract with the company to carry him to such point." Citing *Deitrich v. Railway Co.*, 71 Pa. St. 482; *McClure v. Railway Co.*, 34 Md. 532; *Hatton v. Railway Co.*, 39 Ohio St. 379; *Churchill v. Railway Co.*, 67 Ill. 390. In *Hill v. Railway Co.*, 63 N. Y. 101, it was held that "where a railroad passenger ticket by its terms limits the time within which it is to be used, it does not exonerate the holder from the payment of fare if he takes passage on the road after the expiration of the time; and in case of his refusal to pay, the conductor has a right

to eject him from the train." *Wilsey v. Railway Co.*, 83 Ky. 511; *Elmore v. Sands*, 54 N. Y. 512, held that "a railroad company has a right to provide and insist that its passenger tickets shall be used upon the day when issued; also, that every passenger, when entering a train, shall pay his fare or produce a ticket showing his right to ride upon that train; and in enforcing such regulations, neither it nor its employees are liable."

<sup>76</sup> 72 Ohio State, 283. *Pennsylvania R. Co. v. Jones*, 155 U. S. 333; *Chicago, etc. R. Co. v. Mulford*, 162 Ill. 522; *Penn. R. Co. v. Connell*, 112 Ill. 295; *Kansas City R. Co. v. Foster*, 134 Ala. 244; *Young v. Penn. R. Co.*, 115 Pa. St. 112; *Hartan v. Eastern Ry. Co.*, 114 Mass. 44; *Chollette v. Omaha, etc. R. Co.*, 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135. A company contracting to carry an excursion party by special train to a point beyond its own line is liable. *Washington v. Raleigh, etc. R. Co.*, 101 N. C. 239, 7 S. E. 789. And where defendant, an in-

common carrier of passengers, as distinguished from a carrier of goods or baggage, the doctrine would seem now to be generally well settled that the mere issuance and sale by the former of a coupon ticket good over its own and connecting lines does not of itself import an undertaking or agreement on the part of the issuing or selling company to become responsible for the safe carriage of the passenger to whom such ticket is sold beyond its own line. Yet it is equally true, and not less well settled, we think, that a railroad company selling a ticket for the transportation of a passenger beyond its own line of road, may by contract either express or implied make itself responsible for the safe carriage of such passenger over the entire route covered by the ticket sold."

On the other hand some of the courts hold that the initial carrier is liable to the passenger to whom it furnished such a ticket for the loss or injury suffered on account of the fault or negligence of the connecting carrier in the absence of an agreement limiting its liability to its own line.<sup>77</sup> But this cannot be said to be the weight of authority—nor is it very generally held.

It would seem that there is no rule fixing liability upon the selling or initial carrier in this class of cases outside of a contract expressed or implied and that the mere selling of the ticket would not import such a contract or obligation. The carrier selling the ticket can without doubt limit its liability to its own

tial carrier, sold a ticket over its own and connecting carrier's lines, stating in the ticket that it acted as the agent of the connecting carriers, it being required that the ticket should be stamped by the connecting carrier in the presence of the passenger to render it good returning, it was held that the connecting carrier was not the agent of defendant initial carrier so as to render it liable for the mistakes in punching the ticket to render it good returning. *Boling v. St. Louis, etc. R. Co.*, 189 Mo. 219, 88 S. W. 35.

<sup>77</sup> *Gulf, etc. R. Co. v. Looney*, 85 Tex. 158; *Central R. Co. v.*

*Combs*, 70 Ga. 533; *Georgia, etc. R. v. Pearson*, 120 Ga. 284; *Mathews v. Atchison, etc. R. Co.*, 60 Kan. 11.

<sup>78</sup> *Mosher v. St. Louis, etc. R. Co.*, 127 U. S. 390; *Penn. etc. R. Co. v. Connell*, 112 Ill. 295; *Karrigan v. Southern Pac. R. Co.*, 81 Cal. 248.

In *McWethy v. Detroit, etc. R. Co.*, 127 Mich. 333, it was held that the passenger was chargeable with notice of the conditions printed on her ticket to the effect that defendant acted merely as agent in selling it, and was not responsible beyond its own line.

line, and such a limitation has generally been held valid;<sup>78</sup> and as well can it extend its liability and become liable for the fault and negligence of the connecting carrier.<sup>79</sup>

Where the loss or injury sustained by the passenger while on the connecting line was occasioned by the fault or negligence of the initial carrier, as where it delivered to the passenger the wrong ticket, taking off the wrong coupon, or misrepresenting the facts when selling the ticket, the initial carrier is no doubt liable for the resulting damages,<sup>80</sup> and it is generally held that when the resulting damage is because of the fault or negligence of both carriers, the initial carrier and the connecting carrier, the injured passenger may recover from either or from both jointly, on the principle which obtains in this class of cases as well as in actions for tort generally, that where more than one is guilty of the negligent act which results in the injury, the injured party may proceed against them jointly or severally.<sup>81</sup>

It is not contemplated, nor does the law require, unless it be so stipulated in the ticket, that the passage shall be continuous, but the holder of such a ticket may stop over at the terminus of each line as long as he pleases, provided he commences his journey over the last connecting line within the life of the ticket. And so it has been held that it is only required that the holder of such a ticket present himself upon the vehicle of the last connecting carrier and take passage at a time within that limited by the terms of the contract, and that it is not necessary that he should complete the journey within such time.<sup>82</sup>

<sup>78</sup> The contract may be proven by parol, it being held that the ticket is not such a contract that its terms cannot be contradicted, that it is rather evidence of a contract. *Bussman v. Western Transit Co.*, 71 Fed. 654; *Buffett v. Troy, etc. R. Co.*, 40 N. Y. 168. The contract must be clearly expressed. *Penn. R. Co. v. Jones*, 155 U. S. 333.

<sup>80</sup> *Louisville, etc. R. Co. v. Conrad*, 4 Ind. App. 83; *Head v. Georgia, etc. R. Co.*, 79 Ga. 358; *Griffin v. Utica, etc. R. Co.*, 41 Hun (N. Y.) 448.

<sup>81</sup> *Richard v. Detroit, etc. R. Co.*, 129 Mich. 458, 464; *Roddy v. Railway Co.*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746; *Patterson v. Railway Co.*, 54 Mich. 91, 19 N. W. 761; *Missouri, etc. R. Co. v. Foster*, 97 Tex. 618.

<sup>82</sup> *Lundy v. Cent. Pac. Ry. Co.*, 66 Cal. 191, 56 Am. Rep. 100; *Evans v. Railway Co.*, 11 Mo. App. 463; *Aurbach v. Railway Co.*, 89 N. Y. 281, 42 Am. Rep. 290, and see cases in note 16 L. R. A. 471.



§ 645. — **Delayed by wreck or by the fault of the carrier.** But it has been held that "a ticket over connecting roads limited as to the time, but which is a joint contract of the carriers, entitles a passenger who is delayed by a wreck on one of the roads to complete his journey although the time expires before he reaches the last of the connecting roads."<sup>83</sup>

§ 646. **Tickets, passes and other transportation fraudulently obtained or fraudulently used.**—The maxim of the law, old as the law of contracts, that "fraud vitiates all contracts," applies to the contracts or obligations to carry passengers as effectively as to any other contract. The passenger who presents a ticket, pass, or transportation for his passage may be generally said to be entitled to be conveyed to the station or place mentioned therein; but if the ticket or transportation has been obtained by fraud, either by himself or some other person, the carrier may refuse to honor it, and may take it up and demand payment of fare. In *Frank v. Ingalls*,<sup>84</sup> the court say: "It thus seems to be well established that a railroad ticket is a receipt or voucher; it has more the characteristics of personal property than that of a negotiable instrument. When the possession of such a ticket has been obtained by fraud, the company has parted with the possession of it but not the title to it, and the person purchasing from the holder, although for value and without notice of equities, takes no better title than the party had who fraudulently obtained possession of it." And where a ticket was obtained by false and fraudulent representations, it was held that "the carrier would be justified in taking it up and canceling it."<sup>85</sup> One who conceals himself upon the vehicle and undertakes to beat his way is not entitled to passage; for whoever in any way, by falsehood or by fraud, undertakes to ride free upon the carrier's conveyance is not a passenger.<sup>86</sup> And so a person riding on a free pass issued to another person and not transferable, or upon a non-transferable mileage ticket, who falsely represents himself to be the person to whom it was issued, and by way of carrying out the deception signs the person's name to the check, to

<sup>83</sup> *Gulf, etc. R. Co. v. Looney*, 85 Tex. 158, 16 L. R. A. 471, and notes.

<sup>84</sup> 41 Ohio St. 560.

<sup>85</sup> *Moore v. Railway Co.*, 41 W. Va. 160.

<sup>86</sup> *McVeety v. Railway Co.*, 45 Minn. 268, 47 N. W. 809; *Condran v. Railway Co.*, 14 C. C. A. 596, 67 Fed. 522.

whom the mileage or pass was issued, cannot be considered to be entitled to the rights of a passenger, and in such case the carrier may take up the pass or mileage and require the person undertaking its fraudulent use to pay his fare. In *Toledo, etc. R. Co. v. Beggs*,<sup>87</sup> it was held that "a party traveling in a railroad coach on a free pass issued to a different person, which is not transferable, and passing himself as the person therein named, is guilty of such fraud as to bar his right to recover for a personal injury, except for gross negligence on the part of the company amounting to wilful injury." And the same rule has been held to apply to commutation mileage tickets upon which was a printed notice that the ticket was not transferable, and if presented by any other than the person whose name appeared inside the cover, and whose signature was attached below, it would be forfeited to the company.<sup>88</sup> And it has been held that if a person knowingly induces a conductor of a railroad train to violate a rule of the company and carry him without charge, he is guilty of a fraud on the company and cannot claim the rights of a passenger.<sup>89</sup>

<sup>87</sup> 85 Ill. 80; *Louisville, etc. R. Co. v. Thompson*, 107 Ind. 442, the refusal of the right to recover except for gross negligence, which is equal to wilful injury, is in accord with the legal rule that "the carrier owes no duty to an intruder." *Chicago, etc. R. Co. v. Herring*, 57 Ill. 59. Where one by fraudulent representations, as to his age and occupation procured a student's reduced fare ticket, held not a passenger but a trespasser. *Fitz Maurice v. New York, etc. R. Co.*, 192 Mass. 159, 78 N. E. 418, 6 L. R. A. (N. S.) 1146, and notes; *Grahn v. International, etc. R. Co.* (1906), — Tex. —, 93 S. W. 104, 5 L. R. A. (N. S.) 125.

<sup>88</sup> *Way v. Chicago, etc. R. Co.*, 64 Iowa, 48; and see cases cited in opinion, p. 52. *Thompson on Carriers of Passengers*, 43, sec. 3, where the author says this doc-

trine extends farther and includes the case of one who knowingly induces the conductor of a train to violate the regulations of the company and disregard his obligations of fidelity to his employer.

<sup>89</sup> *McVeety v. Railway Co.*, 45 Minn. 268. The court say: "But if a person solicits and secures free transportation, or if he rides upon a part of the train from which passengers are excluded, or takes passage upon a train not allowed to carry passengers, knowing that his act is against the rules of the carrier, and in permitting it the conductor is disobedient, he is guilty of a fraud and not entitled to a passenger's rights." Citing *Toledo, etc. Co. v. Brooks*, 81 Ill. 245; *Same v. Beggs*, 85 Ill. 80; *Robertson v. Railway Co.*, 22 Barb. 91; *Union Pac. Ry. Co. v. Nichols*, 8 Kan.

§ 647. *Sleeping-car companies.*—Sleeping-car companies, so far as becoming responsible for the carriage of passengers and their valuables, are not common carriers of passengers. As is well understood, railroad companies are under contracts to haul the cars of sleeping-car companies, and they alone are liable to the passenger as common carriers upon their contract for carriage. The passenger rides upon the ticket, or permission issued by the railroad company; <sup>80</sup> the railroad company by its servants and through its direction manages and controls the running of the train and the receiving of all passengers and their effects upon it, and is therefore liable to the passenger for his baggage and valuables as a common carrier.<sup>81</sup> But while sleeping-car companies are not liable, as has been said, as common carriers, they hold out to the public that passengers who pay an extra price for riding in their vehicles will be cared for, and such baggage as is usually understood to be hand-baggage will be looked after, especially when such passengers are asleep in their berths, and for this purpose the companies keep a servant on board the car to attend to the wants of passengers and to keep watch over their effects when the passenger is unable to do so; and while, as was said by the court in *Blum v. Pullman Car Co.*, above cited, “neither as a common carrier nor as an innkeeper is a sleeping-car company responsible,” still it was held that “it must not only furnish a berth to its guests, but keep a watch during the night, exclude unauthorized persons from the car and take reasonable care toward preventing thefts; and if loss should occur by reason of negligence in this regard the company is liable for such articles as are usually carried by a passenger about his person, and such a sum as may be deemed reasonably necessary for traveling expenses.”

Where the porter of a car went to sleep during his watch and also left the car at a station with no one on watch inside, it was held that the sleeping-car company should be held liable for loss

505; *Gulf Ry. Co. v. Camel*, 76 Tex. 174, and other cases.

<sup>80</sup> *Pullman Car Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258; *Scaling v. Pullman Car Co.*, 24 Mo. App. 29; *Ill. Cent. Ry. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Wing v. Sleeping-Car Co.*, 143

Mass. 267, 58 Am. Rep. 135; *Woodruff Sleeping-Car Co. v. Delhl*, 84 Ind. 474, 43 Am. Rep. 102; *Pullman Car Co. v. Pollock*, 69 Tex. 102.

<sup>81</sup> *Blum v. Pullman Car Co.*, 1 Flip. 500 (C. C. W. D. Tenn.), Fed. Cases, No. 1,574.

of the passenger's effects.<sup>92</sup> And so where both the conductor and the porter, being asleep at the rear end of the car for two or three hours, left the door unlocked, and a brakeman sitting in the front end of the car, during which time there was stolen from the passenger's berth, while he was asleep, certain of his baggage, it was held that the company was liable; but the liability of a sleeping or palace-car company is not limited to the care of the baggage and articles of the passengers during the night, but they are liable at all times to exercise ordinary vigilance over such property of a passenger as would usually be taken into the car with him and is placed in the care and custody of the servants of the company. As has been said, the baggage for which the company may become liable, for failure to exercise ordinary diligence in caring for it, is limited to what is ordinarily understood as hand-baggage, or articles which are kept with the passenger upon his journey; such as valises, overcoats, umbrellas, and that which is regarded as necessary to the comfort of the traveler during his occupancy of the car. In determining what may be considered as such baggage, regard may be had to the plaintiff's station in life, the length, purpose and probable duration of the journey.<sup>93</sup> The liability of the company, however, is not that of an insurer of the baggage of the passenger, but it is in the nature of the liability of a bailee for hire. It is said by the Massachusetts court that "such a rule is required by public policy, and by the true interests of both the passenger and the company."<sup>94</sup> The liability being based upon the negligence of the servants of the company, it therefore follows that the passenger's contributory negligence would bar a recovery.<sup>95</sup> But while the mere fact that the passenger has been robbed when asleep would not of itself be evidence of negligence, yet if it should appear that the circumstances of the loss tend to show that but for the negligence of the company or its servants the loss would not have occurred, a *prima facie* case of neg-

<sup>92</sup> Pullman Car Co. v. Adams, 120 Ala. 581, 45 L. R. A. 767.

<sup>93</sup> Root v. N. Y. Cent. R. Co., 28 Mo. App. 199; Hampton v. Pullman Car Co., 42 Mo. App. 134.

<sup>94</sup> Lewis v. New York Sleeping-Car Co., 143 Mass. 267, 58 Am. Rep. 135.

<sup>95</sup> Root v. Sleeping-Car Co., *supra*; Whitney v. Pullman Car Co., 143 Mass. 243; Wicher v. Boston, etc. Co., 176 Mass. 275, 57 N. E. 601; Levien v. Webb, 61 N. Y. S. 1113, 30 Misc. Rep. 196; Lycett v. Railway Co., 42 N. Y. S. 413.

ligence would arise, and the burden of proof of ordinary diligence in such case would be upon the company. As has been said, "the sleeping passenger can never know whether the defendant's servants are keeping diligent watch, and they have the strongest interest to exonerate themselves from any charge of negligence. A rule that would prevent the case from going to the jury without affirmative proof that, at the time when the theft took place, or at some time during the night, the defendant's servants were not keeping watch, would, in most cases, deprive passengers of any redress for the losses which they might sustain through the negligence of the servants of such carriers. Such a rule is not only against reason, but is against public policy, and ought not to be declared." <sup>98</sup>

§ 648. *Not liable as innkeepers.*—Some of the courts have held that the sleeping-car companies are liable as innkeepers,<sup>99</sup> but the great weight of authority is against such a holding. As was said by the Kentucky court, "a sleeping-car is no more an inn on wheels than a steamboat is an inn on water."<sup>100</sup> "The traveler cannot, like the guest of an inn, lock his door and guard against danger." And as has been said, "the peculiar construction of such cars . . . the innkeeper's right to exclude all but guests and their own servants, the company being bound to admit train employees, the inability of the defendant to protect the passenger, the railroad conductor having power to eject him for non-payment of fare or violation of the rules and regulations," all these would indicate that there is a great difference between the innkeeper and the sleeping-car company. The passenger is entirely in the care and custody of the servants of the company. He lies down at night and sleeps, not behind bolts and locks, but protected only by the servants of the company who are supposed to be on watch.<sup>101</sup> It therefore follows as matter of course that for thefts committed by its servants the company would be liable.<sup>1</sup>

<sup>98</sup> *Bevis v. Railway Co.*, 26 Mo. App. 21.

<sup>99</sup> *Pullman Car Co. v. Lowe*, 28 Neb. 239, 6 L. R. A. 809.

<sup>100</sup> *Pullman Car Co. v. Gaylord*, 6 Ky. Law. R. 270, 23 Am. L. Reg. (N. S.) 788.

<sup>101</sup> *Blum v. Pullman Car Co.*, *supra*; *Mann Boudoir Co. v. Du-*

*pre*, 54 Fed. 646, 21 L. R. A. 239. Sleeping-car company liable for property stolen while in porter's care. *Pullman Car Co. v. Lowe*, 28 Neb. 239. For collection of cases see L. R. A. Index-Digest, 117.

<sup>1</sup> *Allen v. Railway Co.*, 119 N. C. 710, 25 S. E. 787. As to right

## III.

## EJECTION OF PASSENGERS AND INTRUDERS FROM THE VEHICLE OF THE CARRIER.

§ 649. *The right—The cause—The manner—By whom.*—A common carrier of passengers may insist upon the passenger, or person upon his vehicle, complying with certain rules and regulations that are just and reasonable, and which must necessarily be complied with as a fulfillment of the implied contract for carriage upon the part of the passenger. As, for example, one of the evidences of the right of the person to be carried is that he has a ticket, or proffers the reasonable compensation due the carrier for transportation; that he conducts himself in an orderly and decent manner; that he is a fit person to be carried and complies with the just and reasonable regulations of the carrier; that he has taken his place in the usual and proper place for passengers upon the vehicle of the carrier. In short, that he has done that which entitles him to become a passenger. If, therefore, the passenger refuses to comply with these reasonable regulations, or if the person upon the vehicle of the carrier is a trespasser and refuses to become a passenger by compliance with such rules and regulations of the carrier, such person may be ejected from the vehicle, for the law will not hold the carrier to the performance of his duties and obligations to the public and those whom he carries as passengers, and at the same time deprive him of the right to insist upon compliance upon the part of those whom he carries with such just and reasonable regulations as are necessary in order to make it possible for the carrier to do his duty to the passenger and to the public. There is, as we have seen, not only an implied contract on the part of the carrier to carry the passenger safely, and to exercise that high degree of diligence which the law lays upon him, but there is also an implied obligation upon the part of the passenger that he will comply with all the just and reasonable regulations of the

to eject passengers holding tickets for stations at which trains do not stop, see *Chicago, etc. Co. v. Bills*, 104 Ind. 13; *Atchison, etc. Ry. Co. v. Gants*, 38 Kan. 608; *Patry v. Railway Co.*, 77 Wis. 218. In *Shelton v. Railway Co.*, 29

Ohio St. 214, it was held that "a railroad company has the right to require passengers to pay fare, and a rule directing its conductors to remove from the cars those who refuse to comply with the requirement is reasonable."

carrier. Involved, therefore, in the question of liability for ejecting a passenger, or an intruder, or trespasser from the vehicle of the carrier, is not only the right of the carrier to do so, but the cause for which it is done, the manner in which it is done, and the authority of the servant or person who does it.

§ 650. — **The causes numerous.**—It would hardly be possible here to enumerate the causes for which the carrier might expel the passenger. It may be said, however, generally, that when a person is once accepted as a passenger he cannot be expelled except for some misconduct; as for refusal to produce a ticket or pay his fare, for drunkenness, disorderly conduct, for practicing or committing offenses, for crimes or misdemeanors upon other passengers; as, for example, stealing from them, picking pockets, gambling, and the like, being afflicted with a contagious disease, or in general for refusing to comply with the reasonable rules and regulations of the carrier. And so it has been held that the conductor of a train is authorized to put off, without using unnecessary force, a passenger whose ticket calls for a station at which he knows that the train does not stop, the passenger refusing to pay his fare, although such passenger has been informed by the conductor of another train that if he boards the train the conductor would be obliged to let him off at his station. "A passenger on a railroad train must show his ticket, or conductor's check given in the ticket's place, when called upon by the conductor, and if he fails to do so, whether wilfully or because he has forgotten having the ticket or check, and refuses to pay fare, he cannot recover damages for his ejection if unnecessary force is not used."<sup>2</sup> This is undoubtedly the prevailing rule. And where a father refused to pay the fare of his child, who was eight years of age and liable to pay fare, it was held "that the law implies a contract on the part of a parent who enters a railroad train with a child *non sui juris*, and subject to payment of fare, to pay the fare of such child, and upon refusal to do so the railroad company has the right to eject both the father and the child from the train."<sup>3</sup>

<sup>2</sup> Price v. Railway Co., 46 W. Va. 538, 33 S. E. 255; Trezona v. Railway Co., 107 Iowa, 22; Ill. Cent. R. Co. v. Bauer, 66 Ill. App. 134.

<sup>3</sup> Braun v. Railway Co., 79

Minn. 404, 82 N. W. 675; Price v. Railway Co., 46 W. Va. 538. A passenger's failure to pay the fare of a child under his care will justify his expulsion though he himself is a minor. Warfield v.

§ 651. — **Passenger's reliance upon statements and promises of servants and agents of the carrier.**—The passenger, as a general rule, is in the hands of the servants of the carrier, and has a right to rely upon the statements and conduct of such servants, where such statements or conduct are not clearly and palpably unreasonable. But while the passenger has the right to so rely upon these statements, it has been generally held that conductors are not bound to rely upon the statements of other conductors, or even agents at the stations, communicated to them by the passenger. And so where passengers have been ejected from the train of the carrier for the reason that a former conductor had taken up his ticket and failed to issue to him a check, or other evidence that he was entitled to be conveyed, the courts have held that the conductor so ejecting the passenger was not guilty of breach of duty, but that the railroad company might be liable because of the action of the former conductor; as where it was a regulation of a railroad company that one who pays his fare between two points on the road, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor and present it to the conductor of the train on which he seeks to complete his journey as evidence of his right to do so.

And where a passenger asks the proper conductor for a stop-over ticket, and, through the conductor's fault, receives, instead thereof, only a trip check, it was held that "such a regulation was a reasonable one, and that the second conductor may still demand of him the additional fare, and upon his refusal to pay it may eject him from the train at some usual stopping place, using no unnecessary force; and that such ejection will be no ground for recovery against the company, although such company will be liable to the passenger for the fault of the first conductor." \* But upon this question the authorities are not entirely

Railway Co., 104 Tenn. 74; Lake Shore, etc. R. Co. v. Orndorff, 55 Ohio St. 539, 38 L. R. A. 140; Philadelphia, etc. R. Co. v. Hoefliet, 62 Md. 300, 50 Am. Rep. 223.

\* Yorton v. Railway Co., 54 Wis. 234; Van Dusan v. Railway Co., 97 Mich. 439; Hufford v. Railway Co., 53 Mich. 118. A

passenger is not called upon to question the right of a conductor in taking up a ticket in order to preserve the right to be carried to destination. The wrongful expulsion of a passenger by a conductor, who had no ticket because it had been taken up by another conductor, renders the carrier



harmonious. In the case of *O'Rourke v. Railway Co.*,<sup>5</sup> the authorities have been collected in the opinion of the court and discussed, and after citing authorities *pro* and *con* the court say: "We concur in the latter view, and hold that a person who makes a valid contract is entitled to passage according to its terms, though the face of the ticket furnished him may not in any true sense express the contract. It is the contract and not the ticket that gives the right to transportation. The ticket is but an evidence of the contract made out and furnished by the carrier, and if it fail to disclose the true contract, the fault is with the carrier, and it is responsible for the natural consequences of the variance."<sup>6</sup>

But where a passenger was ejected from a street-car to which he had transferred from another car, because his transfer checks were improperly punched by the conductor of the first car, it was held that the carrier was liable, and that the passenger could recover therefor, where on the refusal of the second conductor to accept the transfer check, and before he was ejected, the passenger made a statement to the conductor showing that the fault in the ticket was due to the negligence of the first conductor.<sup>7</sup> And where the passenger was induced by the fault of the station agent to take a train not scheduled to stop at his destination, it was held he was entitled to recover upon ejection from the train "before reaching his destination as for a tort, and not merely for breach of contract."<sup>8</sup>

§ 652. **Tendering fare to avoid ejection.**—It seems to be generally conceded by the authorities and the courts that when the train is stopped for the express purpose of ejecting a passenger who has refused to pay his fare, or produce a ticket, or check, or permission from the carrier for his conveyance, it is too late for him to pay or tender his fare, and that the carrier can refuse to allow him to ride upon the train, and, if he has been

liable. *Sloan v. Railway Co.*, 111 Cal. 220, 32 L. R. A. 193; and see notes and briefs.

<sup>5</sup> 103 Tenn. 124, 46 L. R. A. 614.

<sup>6</sup> For authorities cited, see 46 L. R. A., note, p. 614, and opinion, p. 615, etc.

<sup>7</sup> *O'Rourke v. Street Ry. Co.*, 103 Tenn. 124, 46 L. R. A. 614.

<sup>8</sup> *Reynolds v. Railway Co.*, 55

Ohio St. 370; *Pennington v. Ill. Cent. Ry. Co.*, 69 Ill. App. 628; *Ellsworth v. Railway Co.*, 95 Iowa, 98, 24 L. R. A. 173. In *McDonald v. Central R. Co.*, 72 N. J. 280, 62 Atl. 405, 2 L. R. A. (N. S.) 505, the authorities are collected and discussed. The notes published in L. R. A. cited are full and cases cited.

ejected, to admit him again upon the train. This has been held although the train was stopped at a station where it is not scheduled to stop. If, however, the passenger is carried to a regular stopping station of the train and there ejected, he may procure a ticket or again board the train and pay his fare and is entitled to be carried. The distinction seems to be that he is not entitled to be carried where the train is stopped for the express purpose of putting him off; and the same rule has been applied before the ejection if the train has been stopped for the express purpose of ejecting the passenger.\* The passenger, however, is entitled to reasonable time if he alleges that he had a ticket which is lost, or if there is hesitation as to his payment and he seems willing to pay, or where he proposes to obtain the money from another passenger; the rule would seem to be that where there is no wilful, or at least positive, refusal to pay the fare, the conductor would be bound to receive the fare from a third person if offered before the ejection of the passenger who has no ticket or money. At all events, the conductor should not hastily take steps to eject the passenger who seems to be endeavoring to comply by the production of a ticket, or the payment of the money, or who does not refuse to comply with his request.<sup>10</sup>

§ 653. — **The manner of ejecting.**—No matter for what cause the passenger is ejected, the conductor or servants of the

\* Pease v. Railway Co., 11 Daly (N. Y.), 350; Cincinnati, etc. R. Co. v. Skillman, 39 Ohio St. 445; O'Brien v. Railway Co., 15 Gray, 20, 77 Am. Dec. 347; Hoffbauer v. Railway Co., 52 Iowa, 342, 35 Am. Rep. 278. But where the train has stopped at a regular stopping place, an offer to pay fare before a passenger is ejected must be accepted. O'Brien v. Railway Co., 80 N. Y. 236. But if the train does not regularly stop at the station and is stopped for the purpose of expelling him, he is not entitled to prevent his expulsion and continue his passage on that train by tendering fare. Pickens v. Railway Co., 104 N. C. 312; O'Brien v. Railway Co., *supra*. But if the train is not

stopped purposely at the station to put him off, he may pay the fare. Gould v. Railway Co., 18 Fed. 155; Stone v. Railway Co., 47 Iowa, 82.

<sup>10</sup> Texas, etc. Co. v. Bond, 62 Tex. 442, 50 Am. Rep. 532; Louisville R. Co. v. Garrett, 8 Lea, 438, 41 Am. Rep. 640. And in California it was held that a tender by a passenger of the remainder of his fare is in time, although the train has stopped for the purpose of ejecting him, where the money which he had already paid to the conductor had not been returned. Bland v. Railway Co., 55 Cal. 570. See also Georgia, etc. Co. v. Asmore, 88 Ga. 529, 16 L. R. A. 53.

company must use no more force than is necessary, and under no circumstances will they be excused for ejecting a passenger while the train is running at a rate of speed that might endanger his life or limb. And this rule obtains even though the passenger is a trespasser or an intruder upon the vehicle of the carrier. And so it has been held that a carrier is liable for an injury sustained by the malicious and wilful act of its brakeman in expelling one who is a trespasser from the train.<sup>11</sup> It has been held that indecent, insulting and vulgar language of a passenger, unaccompanied by threats, does not justify the conductor in assaulting him; that he may use sufficient force to eject him but no more.<sup>12</sup>

§ 654. The condition of the passenger must be taken into account.—The actions of the servants of the company in ejecting a passenger must be humane; and where the passenger is afflicted with sickness or any physical disability, or even is intoxicated and not in a condition to look out for his own safety the carrier is bound to take all this into account and to treat the passenger accordingly. And so it has been held "that the drunken condition of a passenger would not excuse a carrier from liability for negligently leaving him exposed on a railroad track, where he had fallen from a train through the carrier's fault, and was in consequence dazed and his mental faculties impaired in consequence of the fall."<sup>13</sup>

<sup>11</sup> *St. Louis v. Kilpatrick*, 67 Ark. 47; *Southern Ry. Co. v. Wildman*, 119 Ala. 565; *Brennan v. Railway Co.*, 72 Mo. App. 107; *McIver v. Railway Co.*, 110 Ga. 223; *Chicago, etc. Co. v. Casazza*, 83 Ill. App. 421. Indecent, insulting language of a passenger, unaccompanied by threats or violence, will not justify assault.

<sup>12</sup> *Weber v. Railway Co.*, 62 N. Y. Supp. 1. When the force used to eject amounts to wanton assault, the fact as to whether the plaintiff was rightfully or wrongfully upon the train is not an element in the question of mere recovery. *Toledo, etc. Co. v. Marsh*, 17 Ohio C. C. Rep. 379; *Quigley*

*v. Railway Co.*, 11 Nev. 350; *N. J., etc. Co. v. Brockett*, 121 U. S. 637. If the conductor, acting in the performance of his duty, exceeds the degree of force necessary and injury results, the company is liable. *Jackson v. Railway Co.*, 47 N. Y. 44. See note to *Southern, etc. Co. v. Sanford*, 11 L. R. A. 432; *Lafitte v. Railway Co.*, 43 La. Ann. 34, 12 L. R. A. 237.

<sup>13</sup> *Cincinnati, etc. R. Co. v. Cooper*, 120 Ind. 469, 6 L. R. A. 241. See *Louisville, etc. Co. v. Logan*, 88 Ky. 232, 3 L. R. A. 80; *Mo. Pac. R. Co. v. Evans*, 71 Tex. 361, 1 L. R. A. 476; *Roseman v. Railway Co.*, 112 N. C. 709, 19 L. R. A. 327. As to caring for pas-

Where a street-car conductor, supposing that the passenger was drunk, but in fact he was stricken with apoplexy, removed him from the car in a helpless condition and laid him in the street on a bleak, drizzling day and there abandoned him, it was held the company was liable. And so, as we have seen, the general rule is that the refusal of a passenger to pay his fare will not justify any act which would put human life in peril; and the passenger has a right to repel an attempt to eject him in order to save his own life, or to save himself from great bodily injury, because of the unjustifiable assault of the conductor.<sup>14</sup>

## VI.

### WHEN THE CARRIER IS EXCUSED.

When the injury or loss is caused by the act of God or the public enemy, or occasioned by the fault of the party injured, that is, where he has been guilty of contributory negligence, the carrier will be excused.

§ 655. **When caused by the act of God.**—The carrier will not be held liable when the injury or loss is the immediate result of the act of God, *i. e.*, the immediate result of natural causes "without the intervention of man, and could not have been prevented by the exercise of prudence, diligence and care and the use of those appliances which the situation of the party renders it reasonable that he should employ."<sup>15</sup>

§ 656. **The public enemy.**—And so if the injury or loss be the direct and immediate cause of an act of the public enemy, the carrier is not liable.

§ 657. **Contributory negligence.**—If the negligence of the passenger has materially contributed to the loss or injury, and to an extent that it may be said to be the proximate and natural cause of the injury, there can be no recovery therefor. The principle is well settled that one cannot recover for an injury brought

senger in an intoxicated condition, *Fox v. Mich. Cent. R. Co.*, 138 Mich. 433, 5 Am. & Eng. Ann. Cases, 68. And see cases collected in notes 72 and 73.

<sup>14</sup> *Connolly v. Street Car Co.*, 41 La. Ann. 57; *Hoffman v. Railway Co.*, 87 N. Y. 24; *Lynch v.*

*Railway Co.*, 90 N. Y. 77; *New Jersey v. Brockett*, 121 U. S. 637.

<sup>15</sup> See note, 43 Cent. Law Jour. 427, where cases are collected; *Wald v. Pittsburg, etc. R. Co.*, 162 Ill. 545, 43 Cent. Law Jour. 423 (*Johnstown Flood Cases*).

upon himself by his own fault. "Regarding the case of negligent injury, the general result of the authorities seems to be that if the plaintiff or party injured, by the exercise of ordinary care, under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant nor will it attempt any apportionment thereof."<sup>16</sup> The English rule, which is generally followed in this country, may be said to be as stated in *Tuff v. Warman*,<sup>17</sup> that the mere negligence or want of ordinary care and caution would not disentitle an injured person to recover unless it were such that but for that negligence and want of ordinary care and caution the misfortune could not have happened; or if the negligence of the injured person might, by the exercise of care on the part of the defendant, have been avoided and the injury not inflicted. Applying these principles to the subject in hand, it may be said that the passenger who seeks to recover for an injury occasioned by the negligence of the carrier must show not only that the carrier's negligence was the proximate cause of the injury, but that he was exercising ordinary care.<sup>18</sup> Upon this

<sup>16</sup> Cooley on Torts, 675; Abbott v. Oregon R. Co., 46 Or. 549, 80 Pac. 1012. One boarding a moving train guilty of, Atchison, etc. Co. v. Holloway, 71 Kan. 1, 80 P. 31; Spencer v. St. Louis, etc. Co., — Mo. App. —, 86 S. W. 593; Berry v. Utica, etc. Co., 181 N. Y. 198, 73 N. E. 970; Kroeger v. Seattle, etc. Co., 87 Wash. 544, 79 P. 1115; Bridge v. Jackson, etc. Co., 86 Miss. 584, 38 So. 788; Chicago, etc. Co. v. Albrecht, 114 Ill. 474; Christensen v. Metropolitan, etc. Co., 137 Fed. 708. Not contributory negligence for passenger to undertake to alight before street car stopped for him, though not at ordinary place. Selby v. Detroit Ry. Co., 141 Mich. 112, 104 N. W. 376; Walker v. Georgia, etc. Co., 122 Ga. 368; Alabama, etc. Co. v. Jones, 86 Miss. 263, 38 So. 545. Riding on the running board of open trolley

car when there are seats inside held contributory negligence. Woodroffe v. Roxborough, etc. R. Co., 201 Pa. St. 521; State v. Lake Rowland, etc. R. Co., 84 Md. 163; Moody v. Springfield St. R. Co., 182 Mass. 160. But if car crowded and no seats, not contributory negligence to so ride. The question in the given case is one for the jury. Anderson v. City R. Co., 42 Or. 505; West Chicago, etc. R. Co. v. McNulty, 64 Ill. App. 549; Abel v. Northampton Traction Co., 212 Pa. St. 329; Sellers v. Market St. R. Co., 139 Cal. 268; Hesse v. Meriden, etc. Co., 75 Conn. 571; Dickinson v. Port Huron, etc. Co., 53 Mich. 43; Bridge v. Jackson, etc. Co., 86 Miss. 584, 4 Am. & Eng. Ann. Cases, 662, and notes.

<sup>17</sup> 5 C. B. (N. S.) 573, 585.

<sup>18</sup> North Chicago Street R. Co. v. Baur, 179 Ill. 126, 45 L. R. A.

question the courts of the several states do not entirely agree. Many of the courts hold that it is not incumbent upon the plaintiff to allege this or to prove it in order to make out a *prima facie* case.<sup>19</sup>

§ 658. — **Strangers, trespassers, intruders.**—While, as we have seen, the carrier is not bound to exercise that high degree of diligence toward a stranger, or trespasser, or intruder, that the law demands he shall exercise toward a passenger, still humanity demands that he should exercise such a degree of care as to not unnecessarily cause damage or injury to such a person; and so it follows that if the carrier is guilty of a degree of negligence that a common respect for the laws of humanity would not tolerate, he would be guilty, in an action for the injury, and it would be no defense that the person injured was a trespasser, or a stranger, or an intruder. As, for example, the carrier would not be warranted in placing such a person upon his vehicle in a position where he would be obliged to leap from the train when it was in motion to save himself from other injuries, and if he did so, it could not be said that in thus leaving the train he was guilty of contributory negligence.<sup>20</sup> And where the conductor ordered a person to get off the train while running at a speed which would endanger him in getting off, refusing to stop the train to allow him to alight, and with violent and insulting language threatened to eject him from the train by force if his orders were not obeyed, and had force at his command to execute such threat, and the person jumped from the train to avoid ejection by force, it was held "that this was sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train."<sup>21</sup>

§ 659. — **Failure to warn passengers of danger.**—It is a general rule that a passenger must exercise ordinary care and diligence in avoiding injury. But while this is true, it may be said that it is the duty of the carrier to warn the passenger as to dangerous situations, and failing to do so, the carrier will not be permitted to defend upon the ground of contributory negligence upon the part of the passenger in an action for an injury received because of such danger. This duty to warn the passenger

108. And see long list of authorities cited.

<sup>19</sup> Post, §§ 832, 833.

<sup>20</sup> Southern Ry. Co. v. Hunter,

74 Miss. 444; Great Western R. Co. v. Miller, 19 Mich. 305.

<sup>21</sup> Bogges v. Railway Co., 37 W. Va. 297, 23 L. R. A. 777.

against danger does not apply, of course, to every case. The circumstances of the particular case are to be taken into consideration. As, for example, where a passenger cannot be said to understand the danger of his situation, or where the passenger is a young person, inexperienced and not aware of the danger in which he is placing himself; or one who is somewhat demented or even intoxicated, or deaf and dumb or blind; such persons require more attention, and the duty of the carrier is to extend to them greater care than to the ordinary passenger. These, of course, are but examples. Each case must stand upon its own particular circumstances.<sup>22</sup>

§ 660. — A question of fact for the jury or of law for the court.—As we have seen, the plaintiff, in order to recover in an action brought for personal injury, must not only prove that the injury was the proximate result of negligence upon the part of the carrier, but he is also bound to prove, in those states holding it necessary, that he was exercising ordinary care, and that in the exercise of such ordinary care the injury could not have been avoided. These questions must necessarily be left to the jury for their findings.<sup>23</sup> The question of contributory negligence

<sup>22</sup> *Louisville, etc. R. Co. v. Johnston*, 108 Ala. 62, 31 L. R. A. 372; *Isbell v. Railway Co.*, 27 Conn. 393, 71 Am. Dec. 78; *Brennan v. Fairhaven*, 45 Conn. 298, 29 Am. Rep. 679; *Pittsburg, etc. R. Co. v. Caldwell*, 74 Pa. St. 421; *Fox v. Mich. Cent. R. Co.*, 138 Mich. 433, where the text is cited and quoted. See also notes on the subject of contributory negligence collecting and discussing cases on the subject, 5 Am. & Eng. Ann. Cases, pp. 72, 73. As will be noticed by the cases collected in 5 Am. & Eng. Ann. Cases above cited, the authorities are not entirely in harmony as to how far one intoxicated is to be held to the rule of contributory negligence. Under the note, that when a passenger is negligently injured who is intoxicated, his intoxication does not as mat-

ter of law constitute such contributory negligence as to defeat recovery, is cited among other cases. *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Central R. Co. v. Mackey*, 103 Ill. App. 15; *Cincinnati, etc. R. Co. v. Cooper*, 120 Ind. 469. That it is a question for the jury. Holding that intoxication cannot excuse the passenger from exercising ordinary care. *Strand v. Chicago, etc. R. Co.*, 67 Mich. 380; *Fisher v. West Va. R. Co.*, 42 W. Va. 183; *Wheeler v. Grand Trunk R. Co.*, 70 Conn. 607.

<sup>23</sup> *McQuillten v. Railway Co.*, 64 Cal. 463; *Reddington v. Traction Co.*, 132 Pa. St. 150; *Sonier v. Railway Co.*, 141 Mass. 10; *Palmer v. Railway Co.*, 87 Mich. 231. But see *post*, § 833. Where the case upon the facts is not free from doubt, the court should sub-

should always be submitted to the jury as a question of fact where the testimony is conflicting and the case is not free from doubt upon the facts, or where candid and intelligent men might reach different conclusions upon the facts.<sup>24</sup> Where, however, "facts which constitute contributory negligence are not disputed, the question is one purely of law." And where the uncontradicted testimony shows that the injured party was negligent, it is a question of law for the court whether he was guilty of such contributory negligence as would defeat the action.<sup>25</sup> And it has been held that to warrant the court in any case in instructing the jury that the plaintiff was guilty of negligence, the case must be so clear against him as to warrant no other inference.<sup>26</sup>

§ 661. — **Whether a question of law or fact.**—As to whether certain facts which are shown to exist in a given case, without question or dispute, are sufficient to constitute negligence or diligence is a question of law for the court; whether these facts actually exist in the given case—whether they are in fact true,—is a question of fact for the jury. And so it follows that the question of diligence or negligence is generally one of mixed law and fact. The admission of proof proposed, the effect of the evidence if adduced, would be questions of law for the court. The weight of the testimony given, its sufficiency to prove negligence or diligence, is a question of fact for the jury.

In *Gardner v. Railroad Co.*<sup>27</sup> the court say: "The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

mit the question of negligence to the jury. *Sheldon v. Railway Co.*, 59 Mich. 172. The question of negligence, where the testimony is not conflicting, is for the court. *Mynning v. Railway Co.*, 64 Mich. 93.

<sup>24</sup> *Luke v. Wheat Mining Co.*, 71 Mich. 364; *Dundas v. Lansing*, 75 Mich. 499; *Underhill v. Railway Co.*, 81 Mich. 43; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408.

<sup>25</sup> *Melzer v. Peninsular Car Co.*, 76 Mich. 94; *Apsey v. Railway Co.*, 83 Mich. 440.

<sup>26</sup> *Detroit, etc. R. Co. v. Van Steinberg*, 17 Mich. 99; *Hutchinson v. Car*, 639.

<sup>27</sup> 150 U. S. 349-361; *Railway Co. v. Ives*, 144 U. S. 408-417; *Railway Co. v. Cox*, 145 U. S. 593, 606; *Sadowski v. Car Co.*, 84 Mich. 100.



The court, in *Railroad Co. v. Miller*, say: "It is frequently difficult, perhaps sometimes impossible, to determine how far the question of negligence or reasonable diligence is a question of law, and how far a question of fact. It is generally a question of mixed law and fact; and always, when the facts are found or admitted, if they be such that all reasonable men will be likely to draw from them the same inferences, it is a question of law for the court. But I know of no case in which it can be said with accuracy to be exclusively a question of fact for the jury; some principle of law will always be applicable to the particular state of facts, and may be laid down by the court; the principle may sometimes be very general and abstract, but there is still a legal principle involved."<sup>28</sup>

The test seems to be, would different minds honestly draw different conclusions from the state of facts submitted? If they would, then the question must be submitted to the jury; but if the minds of ordinary men could draw from the facts only one conclusion—if there is no dispute, no different opinion,—then the question would be for the court; but, as has been said, it is exceedingly difficult to find a state of facts where the question as to negligence or diligence would be entirely one of law for the court. It is clearly a mixed question of law and fact.

Certain acts, when proven and not disputed or admitted, have been held to be, as matter of law, negligence;<sup>29</sup> and yet upon an examination of the cases we are led to conclude that no fixed rule can be laid down that will at all times and under all circumstances govern the question. As, for example, it is generally conceded that jumping from a moving train is negligence, but very much depends upon the rate of speed at which the train or car is moving, and the person who jumps from it. If one should jump from a train going at such a rate of speed that it would be conceded by all to be hazardous and imprudent, when every reasonably prudent man would say it was fraught with danger, unquestionably the court would be warranted in saying it was negligent. The supreme court of Pennsylvania, in *Jaggers v. Railway Co.*,<sup>30</sup> held that jumping from an electric car moving

<sup>28</sup> 25 Mich. 274; *Schoepper v. Hancock, etc. Co.*, 113 Mich. 582; *Lillibridge v. McCann*, 117 Mich. 84; *Cooley on Torts* (2d ed.), 812; *Detroit R. Co. v. Van Steinberg*, 17 Mich. 99.

<sup>29</sup> *McQuilten v. Railway Co.*, 64 Cal. 463.

<sup>30</sup> 180 Pa. St. 436. It is not negligence *per se* to attempt to leave a moving train; whether it is negligence or not depends upon

at the rate of four or five miles an hour is contributory negligence as matter of law, and no doubt this was a correct holding in the given case; and yet it goes without saying that a railroad man accustomed to getting on and off moving trains could easily and safely alight from a train running at that rate of speed. If the car is moving at a high rate of speed there would be no question; but if not, all the circumstances would have to be considered before it could be said, as matter of law, to be negligent. It has been held to be "gross negligence in a person to jump from a car which is going at the rate of twenty miles an hour, whether or not he knows that the speed is so high."<sup>31</sup> On the other hand it was held: The mere fact that a street-car is moving slowly when a man attempts to get on does not make him guilty of negligence as matter of law, but the question is for the jury.<sup>32</sup>

"It is not under all circumstances negligence as matter of law," say the New York court, "for a person to get upon a street-car while it is in motion. In exceptional cases it may be so, but ordinarily it is a question for the jury."<sup>33</sup> In such cases we must apply the old test: is the act so obviously hazardous that a man of ordinary prudence would not attempt it? If so, it is negligence.

§ 662. *Same subject.*—Numerous cases might be cited where the courts have held the acts of passengers and persons seeking damages in personal-injury cases to be as matter of law contributory negligence, or so clearly negligent that no recovery could be had; as where passengers have alighted upon the side of the train where there is no platform instead of upon the platform; where passengers in getting off were injured by a passing train

all the circumstances of the case; as upon the rapidity of the motion, whether it is night or day, whether the place is favorable or otherwise, and the like. *Little Rock v. Atkins*, 46 Ark. 423; *St. Louis, etc. R. Co. v. Cantrel*, 37 Ark. 526; *Pa. etc. Ry. Co. v. Marion*, 123 Ind. 415; *Weber v. Railway Co.*, 100 Mo. 194; *Rickets v. Railway Co.*, 85 Ala. 600; *Mich. Cent. R. Co. v. Coleman*, 28 Mich. 440; *Graham v. Railway Co.*, 39 Fed. 596; *Files v. Railway Co.*, 149 Mass. 204; *Smith v. Railway Co.*, 55 Iowa, 33.

<sup>31</sup> *Masterson v. Street Car Co.*, 88 Ga. 436.

<sup>32</sup> *Morrison v. Street Car Co.*, 130 N. Y. 166.

<sup>33</sup> *Ependorff v. Street Car Co.*, 69 N. Y. 195, 25 Am. Rep. 171. See collection of cases in notes 38 L. R. A. 786; *Chicago Ry. Co. v. Mumford*, 97 Ill. 560; *Connor v. Citizens' Ry. Co.*, 150 Ind. 62, 55 Am. Rep. 177; *Stager v. Ridge, etc. Ry. Co.*, 117 Pa. St. 70; *Moylan v. Second Ave. R. Co.*, 128 N. Y. 583.

or car; where persons have fallen from the top of freight cars where they voluntarily sought to obtain a ride, and without permission; or where the injury was received while riding upon the engine without permission; or in a place upon a train where the passenger was not allowed to be, by reason of exposing to danger a part of his person, as by thrusting his head out of the open window while the train is running at a high rate of speed, or projecting his arms or limbs from the car, or hanging over the side of the steps or platform of the car of a running train, or crawling under the car of a train standing upon the track—in short, to do that which ordinarily prudent men without dissent would consider extra-hazardous.<sup>84</sup>

§ 663. — **When excused.**—The law sometimes has regard for the frailties of human nature and often regards the trying situation of persons who may be said to be guilty of carelessness while endeavoring to extricate themselves or those depending upon them from trying dilemmas. As where a mother accompanied by three children, on arriving at an intermediate station, proceeded to alight with them; two of the children had left the car, and while the plaintiff was still upon the train the car started, when she sprang to the platform on which one of the children had fallen prostrate, and was injured. It was held that this was not such negligence as would prevent her from recovering damages for injuries sustained by the premature starting of the train. The court say: "that it is wrong for a party to attempt to leave cars while they are in motion is an abstract truth, that counsel complain of the court for misapplying here. It is one thing to define a principle of law and a very different matter to apply it well. The rights and duties of parties grow out of the circumstances in which they are placed."<sup>85</sup> The rule has been held to be, if a passenger is placed in a position of peril by the negligence of the carrier, so that he is compelled to choose between the two evils of jumping from the moving car or being

<sup>84</sup> Walker v. Vicksburg R. Co., 41 La. Ann. 795, 7 L. R. A. 111; Richmond v. Second Ave. Railroad Co., 76 Hun (N. Y.), 233; Sharkey v. Lake Roland R. Co., 84 Md. 163; Offerman v. Union Depot Co., 125 Mo. 48; Dasch v. North Chicago, etc. R. Co., 40 Ill. App. 583; Jewel v. Railway Co.,

54 Wis. 610; New York, etc. R. Co. v. Enches, 127 Pa. St. 316; Porter v. Railway Co., 80 Mich. 156; Watson v. Railway Co., 81 Ga. 476; Lake Shore, etc. Co. v. Banks, 47 Mich. 470; Richmond, etc. Co. v. Scott, 88 Va. 968.

<sup>85</sup> Pennsylvania Ry. Co. v. Kilgore, 32 Pa. St. 292.

injured by the other peril, it will not be negligence for him to jump.<sup>36</sup> As where a passenger is induced to jump off the train by an impending collision, he will not be held guilty of contributory negligence.<sup>37</sup> And this is held to be the rule even though no injury would have befallen the person if he had not made the attempt to escape the threatened danger. The question in such a case is not what a prudent person under ordinary circumstances would have done, for cool presence of mind could not be expected under such circumstances, and the law takes into consideration the frailty of human nature and considers the emergency in which the person is placed, the excitement and the influence of fear and danger which has taken possession of him.<sup>38</sup>

§ 664. **Failure to perform contract of carriage within stipulated or reasonable time.**—There is an implied undertaking on the part of the carrier that he will at least carry the passenger to the point desired upon its line within a reasonable time, where the time of departure and arrival is more or less definitely fixed by the published time-tables or schedules of the carrier com-

<sup>36</sup> *Twomley v. Cent. Park R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162.

<sup>37</sup> *Heath v. Glen Falls Street Car Co.*, 90 Hun (N. Y.), 560; *Dimmey v. Wheeling R. Co.*, 27 W. Va. 32, 55 Am. Rep. 292; *Washington, etc. R. Co. v. Hickey*, 5 App. D. C. 436. The fact that a woman gets off a moving car upon its turning into the barns, upon refusal to stop to let her off, will not prevent her recovery for an injury caused thereby, if she had been subjected to insult upon being carried into the barns upon a previous occasion and thought that her only way to escape the same treatment was to leave the car. *Ashton v. Detroit City R. Co.*, 78 Mich. 587; and see notes 38 L. R. A. 786.

<sup>38</sup> *Adams v. Hannibal, etc. Co.*, 74 Mo. 553, 41 Am. Rep. 333; *Beach, Contributory Negligence*, 44; *Galena, etc. R. Co. v. Fay*, 16 Ill. 558; *Kleiber v. People's R.*

*Co.*, 107 Mo. 240, 14 L. R. A. 613. Held, "to jump from a street-car which is about to cross a railroad track is not contributory negligence as matter of law sufficient to defeat an action for injuries thereby received, although such action proved to be wrong, where the view of the track was entirely cut off until the crossing was reached, when an engine was seen approaching only a short distance away, and the gate-keeper, who appeared greatly confused, was lowering the gates so as to stop the street-car, directly on the track, while the actions of the passengers and bystanders indicated an apprehension of imminent peril." *Washington, etc. Co. v. Hickey*, 5 App. D. C. 436; *Houston, etc. Co. v. Norris*, 41 S. W. 708; *Citizens', etc. R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54, citing long list of authorities.

pany. Upon these time-tables the passenger has a right to rely, to the extent, at least, that the carrier will make good the representations contained in them if he can do so by reasonable efforts. He does not guarantee to the passenger that he will start his vehicles on the time mentioned in the time-tables; he may be reasonably detained; but he must as nearly as he can, and consistent with the best interest of the traveling public and his own business, fulfill the representations he so makes. And so where a passenger who had engaged transportation from New York to San Francisco was unreasonably detained at Panama by the default of the transportation company, and was thereby specially damaged, it was held that he might maintain damages from the carrier.<sup>39</sup> These actions are sustained upon the theory that the carrier is guilty of negligence, and it is the damage arising from the unreasonable delay of the carrier that may be recovered; and so it must necessarily follow that if the carrier company has done all that reasonable care and skill could do to transport the passenger punctually, and the delay cannot be attributed to any negligence upon his part, the carrier would not be liable. It has been said that "the publication of a time-table in common form imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moment indicated in the time-table; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to their negligence."<sup>40</sup>

<sup>39</sup> *Buskirk v. Roberts*, 31 N. Y. 661. In *Sears v. Eastern Ry. Co.*, 14 Allen, 433, it was held "that railroad corporations, by advertising the hours when trains will start, agree with holders of tickets that trains shall start at the hours named, but with an implied reservation of power to change the hours upon giving reasonable notice."

<sup>40</sup> *Gordon v. Manchester*, 52 N.

H. 596. In *Savannah, etc. R. Co. v. Bonaud*, 58 Ga. 180, it was held that "a railroad company which fails to run a train according to its published schedule, unless prevented by some valid reason, is liable to a person sustaining injury from such failure for the damages actually sustained by him as the direct and necessary result thereof."

## CHAPTER IV.

### LIMITATION OF LIABILITY.

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| <p>§ 665. Three classes of holdings by the courts.</p> <p>666. The first class: Carrier cannot limit liability where damage results from his own or servant's negligence.</p> <p>667. The second class: Carrier can limit liability even though damage the result of his own or servant's negligence.</p> | <p>§ 668. The third class: May limit for negligence but not for gross negligence.</p> <p>669. The weight of authority.</p> <p>670. Free passes—Limitation of liability for injuries to persons riding upon.</p> <p>671. Limitations growing out of that which is incident to the carriage.</p> |
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§ 665. Three classes of holdings by the courts.—That the carrier of passengers may to some extent limit his liability for injuries or damages which are not the result of his own negligence or the negligence of his servants seems to be conceded; but where the injury or damage is the result of the carrier's own negligence or that of his servants, there is irreconcilable conflict in the rulings of the courts. The rulings of the several courts upon this subject may be divided into three distinct classes, or groups, all dividing upon the question of negligence. The first class holds that the carrier cannot limit his liability when the damage or injury results from his own or his servant's negligence. The second class is directly opposed to the first, holding that by special contract the carrier can limit his liability even to the extent of excusing himself for damage or injury resulting from his own negligence or that of his servants. The third class holds that, while the carrier may limit his liability for negligence, he cannot limit such liability if the negligence is gross; in other words, that he will be required to exercise at least ordinary diligence.

§ 666. The first class: Carrier cannot limit liability where damage results from his own or servant's negligence.—The courts holding to this doctrine base their opinion upon the theory

that the common carrier is in the exercise of his duties and privileges a *quasi*-public officer; that the carrier and passenger who seek to enter into a contract limiting the liability are not the only parties interested, but that the public generally are affected; and that to be exonerated from the exercise of that high degree of diligence that attaches to the common carrier of passengers by a contract between the carrier and the passenger would be to disregard the public interest and the public demands, and would therefore be in violation of public policy, and for that reason such contracts would be void. As was said in a recent case respecting the duty of a common carrier, "the duty to use extraordinary diligence to protect the lives of his passengers cannot be waived."<sup>1</sup> And so where a common carrier sought to relieve himself from liability for injury received by a drover riding upon a return pass without paying fare, the contract stipulating that in consideration of such passage the drover assumed all risk, the court said: "It is very well established in this state that a contract for such an exemption from liability by a common carrier is void as against public policy. The defendant could not by any agreement however plain and explicit wholly relieve itself from liability for injuries caused by its negligence or the negligence of its agents or employees."<sup>2</sup> A leading case upon this subject, and one which has been often followed in the United States supreme court and in the state courts, is that of *Railroad Co. v. Lockwood*,<sup>3</sup> where the supreme court of the United States discuss fully this question. In Pennsylvania it seems to be settled by a long course of decisions that a common carrier of passengers cannot limit his liability so as to exonerate himself from injuries occurring from his own negligence or that of his servants. In *Farnham v. Railway Co.*<sup>4</sup> the court say: "The doctrine is firmly settled that a common carrier cannot limit his liability so as to cover his own or his servant's negligence." And the Indiana court say: "The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment

<sup>1</sup> Cent. Ga. Ry. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202.

<sup>2</sup> Davis v. Chicago, etc. Ry. Co., 93 Wis. 470, 33 L. R. A. 654.

<sup>3</sup> 17 Wall. (U. S.) 357, 21 L. Ed.

627; Inman Co. v. Railway Co., 128 U. S. 128; Liverpool, etc. Steam Co. v. Insurance Co., 129 U. S. 397.

<sup>4</sup> 55 Pa. St. 62.

will be regarded as unreasonable, contrary to public policy, and therefore void.<sup>5</sup>

§ 667. **The second class: Carrier can limit liability even though damage the result of his own or his servant's negligence.**—The second class of decisions is directly opposed to the first, holding that the carrier may, by special contract, limit his liability where the damage complained of was the result of his own negligence or that of his servants, contending that this rule in no way does violence to public policy, for the reason that the contract is one which interests no one except the passenger and the carrier; that it is a subject-matter in which no other interests are involved except the interests that are controlled and possessed entirely by the contracting parties. This doctrine is fully discussed in the case of *Trenton, etc. R. Co. v. Guarantors, etc. Co.*<sup>6</sup> This case was brought upon a written contract whereby the defendants indemnified the railroad company against liability for injury to or death of persons by casualties occurring in, upon or about their railroad, etc. The question as to the validity of the contract was before the court. The court say: "The proposition which one would assert who contested the validity of such a contract would obviously be this, namely, that a contract whereby a common carrier of passengers is to be indemnified against damages which he was required to pay for personal injuries occasioned by his negligence or by the negligence of his agent is contrary to public policy, and therefore unenforceable. It is admittedly difficult, if not impossible, to formulate a satisfactory statement of what is meant by the words 'public policy.' . . . The only reason which I find possible to conceive to be capable of being urged in support of the proposition that the contract before us in this case is contrary to pub-

<sup>5</sup> *Louisville, etc. Co. v. Faylor*, 126 Ind. 126; *Ind. Cent. Ry. Co. v. Mundy*, 21 Ind. 48; *Ohio, etc. Ry. Co. v. Nickless*, 71 Ind. 271; *Gulf, etc. Co. v. McGown*, 65 Tex. 640; *Mo. Pac. Ry. Co. v. Iby*, 71 Tex. 409, 1 L. R. A. 500; *Carroll v. Railway Co.*, 88 Mo. 239; *Jacobus v. Railway Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Bryan v. Railway Co.*, 32 Mo. App. 228; *Voight v. Railway Co.*, 79 Fed. 561 (C. C.

S Div. Ohio); *Louisville, etc. Co. v. Keifer*, 146 Ind. 21; *Railway Co. v. McLaughlin*, 73 Fed. 519; *Tibby v. Railway Co.*, 82 Mo. 292; *Jones v. Railway Co.*, 125 Mo. 666, 26 L. R. A. 718; *Cleveland, etc. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Ill. Cent. Ry. Co. v. Crudup*, 63 Miss. 291.

<sup>6</sup> 60 N. J. Law, 246, 44 L. R. A. 213.



lic policy is that the indemnity thereby provided for a common carrier of passengers may tend to render him less careful in the performance of his duty to his passengers than he otherwise would be. It is obvious that such is not the purpose of the contract for indemnity. The insurer does not contemplate the relaxation of the carrier's vigilance, which would tend to throw additional liability upon him. The insurer is held to the performance of his duty of vigilance both by his liability, notwithstanding the indemnity, and by the fact that the vigilant carrier would obtain better terms in making the contracts of insurance. It is further obvious that if a contract indemnifying the common carrier of passengers against liability arising from his negligence tends to a relaxation of vigilance inimical to the public interest, so a contract indemnifying a common carrier of goods against the consequences of his negligence must have the same effect and be obnoxious to the rule avoiding contracts contrary to public policy. Yet it now seems well settled that a common carrier of goods may enforce contracts of insurance on goods carried against all losses, including those occasioned by his negligence or the negligence of his servants. . . . The result is that the reserved question must be answered in favor of the validity of the contract upon which this action is founded."

The leading case in this class is one from the New York court—*Bissell v. Railway Co.*<sup>1</sup> In this case the court say: "If he (the passenger) may by contract assume certain risks in consideration of riding free, why may he not make a contract to assume the same risks in consideration of being carried at half price, etc.? When we once hold that assuming these risks is within his power as matter of contract, the court has no power to interfere with his contract on the score of *quantum* of consideration, or on any ground but illegality of consideration." And in this case the court further held "that a common carrier, in consideration of an abatement, in whole or in part, of his legal fare may lawfully contract with a passenger that the latter will take upon himself the risk of damage from the negligence of agents and servants for which the carrier would otherwise be liable; that public policy is satisfied by holding a railroad corporation bound to take the risk when the passenger chooses to pay the fare established by the legislature. If he voluntarily and for any valu-

<sup>1</sup> 25 N. Y. 442.

able consideration waives the right to indemnity, the contract is binding." And where the plaintiff, "while traveling on a regular train on defendant's road, on a free pass, was injured by a collision caused by defendant's negligence, and, where upon the pass there was an indorsement to the effect that, in consideration of receiving it, the holder assumed all risks of accident and agreed that the company should 'not be held liable under any circumstances, whether by negligence of their agents or otherwise,' for injury to his person or property, and that in the use of the pass he would 'not consider the company as a common carrier or liable as such,' and where in an action to recover damages for the injury it appeared that the plaintiff had purchased a ticket entitling him to a seat in the drawing-room car upon the train, from the drawing-room conductor, and it was stated in the check given for the seat that it, 'with passage ticket or fare,' would be taken up by the train conductor, it was held that 'this did not make plaintiff a passenger for hire, and did not have the effect to annul or vary, for the trip, the contract made by the pass and its indorsement; that assuming such a purchase of a seat ticket has the same force and effect as if purchased from the train conductor.' . . . And so long as the pass was used to secure transportation did not in any way affect the validity of the agreement expressed therein."<sup>8</sup> In Massachusetts it was held that "an agreement by one who accepts a railroad pass purely as a gratuity, that he will assume all risks of accident of every name and nature, is not against public policy, and will prevent a recovery by him for injuries occasioned by the negligence of the railroad company's servants."<sup>9</sup> This appears to be the rule both in England and in the Canadian courts.<sup>10</sup> The supreme court of Maine have also held to this doctrine, and in *Rogers v. Steamboat Co.*<sup>11</sup> it was said that "a condition in a free pass that the passenger will assume all risks of personal injury is not against public policy."

<sup>8</sup> *Ulrich v. Railway Co.*, 108 N. Y. 80.

<sup>9</sup> *Quimby v. Railway Co.*, 150 Mass. 365, 5 L. R. A. 846.

<sup>10</sup> *Southerland v. Railway Co.*, 7 U. C. C. P. 409; *Hall v. Railway Co.*, L. R. 10 Q. B. Div. 437; *Gallin v. Railway Co.*, L. R. 10 Q. B.

Div. 212; *McCawley v. Railway Co.*, L. R. 10 Q. B. Div. 57.

<sup>11</sup> 86 Me. 261, 25 L. R. A. 491; *Griswold v. Railway Co.*, 53 Conn. 371; *Wells v. Railway Co.*, 24 N. Y. 181; *Muldoon v. Seattle, etc. Co.*, 7 Wash. 529; *Kirney v. Railway Co.*, 34 N. J. L. 513; *Hosmer*

**§ 668. The third class: May limit for negligence but not for gross negligence.**—The third class of authorities holds that the common carrier of passengers may limit his liability for injuries resulting from the negligence of himself or servants if such negligence is not gross negligence, but that for gross negligence he must be held liable.<sup>12</sup>

**§ 669. The weight of authority.**—It is difficult to determine where the weight of authority rests, but it seems to be conceded by most of the authorities upon this subject that the weight of authority in this country is that a common carrier of passengers cannot, by special contract or otherwise, limit his liability for injury or damage resulting from the negligence of himself or his servants; that such a contract would be void. Both reason and humanity would dictate that this should be the law. Nothing is held so important and so sacred in the law as the protection of life and limb. One may barter away his property, but the law would not permit him to put his own life in the scale; he may possess it and protect it, but to destroy it is a crime. It is therefore difficult to see upon what principle one engaged in so dangerous and hazardous a business as that of a common carrier of passengers can be relieved by contract from the results of his own or his servant's negligence that often involves the loss of life, even though such contract is based upon a valuable consideration, and still more difficult when the injuries are the direct result of gross negligence on the part of himself or his servants; and so it would seem that reason and justice and public policy would suggest that the carrier cannot so limit his liability by contract.

**§ 670. Free passes—Limitation of liability for injuries to persons riding upon.**—There has been a great deal of discussion and a variety of holdings in the courts as to the validity of contracts between the carrier company and persons riding upon free passes over their road. It is somewhat difficult to determine just where the weight of authority rests, as some of the strongest courts in the Union differ in their opinion upon this

v. Railway Co., 156 Mass. 506;  
Bates v. Railway Co., 147 Mass.  
255; Doyle v. Railway Co., 162  
Mass. 66; S. C., 166 Mass. 492.

<sup>12</sup> Railway Co. v. Hawks, 36 Ill.  
App. 327; Ill. Cent. R. Co. v.

Beebe, 69 Ill. App. 363; Ill. Cent.  
R. Co. v. Read, 37 Ill. 484; To-  
ledo, etc. Co. v. Railway Co., 85  
Ill. 80, 28 Am. Rep. 615; Annis v.  
Railroad Co., 67 Wis. 46.

subject; but in those courts where it has been held that such contracts are valid and that the passenger cannot recover, even though the injury is the result of the negligence of the carrier or his servants, some modification has been made where the pass was issued to the passenger for a valuable consideration, either direct or indirect; as, for example, a pass given to a drover in order that he may accompany the stock shipped by him over the road, or where the pass is given to one who is engaged to perform a service for the company, or where the journey of the passenger is directly or indirectly for the benefit of the company;<sup>18</sup> but it would seem that the weight of authority is that

<sup>18</sup> In *Doyle v. Railway Co.*, 166 Mass. 492, the plaintiff's intestate was employed by the railroad company as a clerk in its freight department; on the occasion of his injury he was traveling upon a pass going from the city of Boston, where he was employed, to his home in Waltham, as he had been in the habit of doing Saturday afternoons at the close of his week's work. On the back of the ticket, or pass, upon which the intestate was riding were the following conditions: "The person accepting this free ticket, thereby, and in consideration thereof, assumes all risk of accidents, and expressly agrees that the company is not a common carrier in respect to him, and shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for injury to the person, or for loss or injury to the property of the passenger using this ticket." The case was twice before the court and was first considered in 162 Mass. 66. The court in its opinion say: "We assume that if the ticket had been a gratuity, the contract on the back of it would have precluded a recovery, and that it would have made no

difference that the negligence was gross. How far common carriers may go in contracting to be relieved from the consequences of their own negligence and that of their servants is a matter on which different courts have taken different views, and on which, in some instances, courts within the same jurisdiction have expressed themselves differently at different times. It is clear that they have not an unlimited power of contract in this respect. A private individual may refuse to transport a person from one place to another unless the latter will agree to assume all risk of injury. But railroad corporations would have no right to insist as a condition of carrying a passenger that he should make such a contract. This arises out of the nature of the service which they undertake. . . . Although the liability of a carrier of merchandise is that of an insurer, and the liability of a carrier of passengers is measured by the highest degree of care which human foresight will reasonably admit of, we see no valid reason for holding that in the former case the carrier cannot be exempted from his own negligence, and that in

the railroad company may limit in a degree their liability where a gratuitous pass is given to the passenger upon which there is a limitation written and signed by the passenger that he assumes all risks of accident, and that the carrier company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, but that there can be no limitations even in such cases to the extent of excusing the carrier for gross negligence of himself or his servants. Some of the courts, including some of the most learned, however, have held that these limitations are valid and are to be held as binding and effective to the full measure of their language; but notwithstanding this it is difficult to see how such contracts are not in violation of public policy.<sup>14</sup>

the latter he may." *Quimby v. Railway Co.*, 150 Mass. 365; *Rogers v. Railway Co.*, 86 Me. 261; *Griswold v. Railway Co.*, 58 Conn. 371. In *Railway Co. v. Stevens*, 95 U. S. 655, the plaintiff, who was injured, was performing some service for the railroad company and riding upon a free pass with the usual conditions exempting the company upon it; the court held that the pass was given for a consideration, and that therefore he was entitled to the privileges of a passenger, and that the acceptance of a pass with the conditions exempting the company from liability would not estop him from recovering damages for the injury.

<sup>14</sup> A contract exempting a carrier company from liability for injuries to passengers, except in cases where the injury is the result of gross negligence of its employees, held to be void. *Railway Co. v. Beebe*, 69 Ill. App. 363; *Railway Co. v. Keefer*, 146 Ind. 21; *Railway Co. v. Read*, 37 Ill. 484; approved in *Railway Co. v. Reggs*, 80 Ill. 80, 28 Am. Rep. 613. And in *Railway Co. v. Hawks*, 36 Ill. App. 327, it was held that a

stipulation in a free pass exempting a railroad company from liability for injuries resulting from negligence, except where the negligence is gross, of itself or servants, was held valid. Railroad company held for gross negligence notwithstanding contract excusing from negligence. *Indiana Cent. Ry. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 329. Company held for its negligence notwithstanding contract. See *Rose v. Railway Co.*, 39 Iowa, 246; *Brush v. Railway Co.*, 43 Iowa, 554. Conditions exempting railroad company held void. *Jacobus v. Railway Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Bryan v. Railway Co.*, 32 Mo. App. 228; *Railway Co. v. Henderson*, 51 Pa. St. 315; *Railway Co. v. Bausch*, 7 Atl. 731; *Annis v. Railway Co.*, 67 Wis. 46, 30 N. W. 282. Courts holding the conditions or contract releasing carriers from liability indorsed upon the pass valid. *Rogers v. Kennebec*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491, holding that "a condition in a free pass exempting the carrier from all liability for personal injury is valid." Where the free pass was

§ 671. Limitations growing out of that which is incident to the carriage.—In the carrying on of every business there are certain limitations, or qualifications, of the liability of the owner, or proprietor, that of necessity grow out of that which is incident to the doing of the very thing that results in damage; as, for example, the manufacturer who employs men to run dangerous and intricate machinery; the employee in accepting the employment understands that the machinery is dangerous and that he must bring to the using of it care and skill, and if he is injured in its ordinary use the courts have held that the risk is one that he assumes when he accepts the employment. This same principle may be applied to the subject we are here considering; the common carrier of passengers is held to the very highest degree of diligence in operating his vehicles, trains, or boats; but there are certain risks that the passenger must be held to take

a gratuity, held valid. *Quimby v. Railway Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Kinney v. Railway Co.*, 32 N. J. L. 407, 90 Am. Dec. 675; *Wells v. Railway Co.*, 24 N. Y. 181; *Perkins v. Railway Co.*, 24 N. Y. 196; *Blissell v. Railway Co.*, 25 N. Y. 442; *Muldoon v. Railway Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794. For a general discussion as to limitation of liability by carriers for personal injuries to passengers, see note and collection of authorities following *Clark v. Geer*, 32 U. S. C. C. App. 301.

In *Indianapolis Traction, etc. Co. v. Lawson*, 74 O. C. A. 630, 143 Fed. 834, 5 L. R. A. (N. S.) 721, where a street-car company undertook to give a convention of women a free ride over its lines by the use of its cars under the control of its servants, it was held that the company was bound to exercise at least ordinary care, and failing to do so was liable.

In the case of *Bradburn v. Whatcom County Ry. & Lt. Co.* (Wash.), 88 Pac. 1020, the de-

fendant sought to excuse the injury to the passenger on the ground that he was riding on a free pass in violation of law. The court held that the right of recovery for injuries does not depend on the existence of a contract of carriage. The passenger may maintain an action *ex delicto* for the failure of the carrier to do his duty. That the illegality of the pass did not render the passenger a trespasser; that if it was a void pass the conductor should have demanded pay for transportation. *McNeill v. Durham, etc. R. Co.*, 135 N. C. 682.

As to liability of carrier to those riding on free pass, *Norfolk, etc. R. Co. v. Tanner*, 100 Va. 379; *Williams v. Oregon Short Line*, 18 Utah, 210; *Louisville etc. R. Co. v. Taylor*, 126 Ind. 126; *In re California Nav. etc. Co.* 110 Fed. 670; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 166 Mass. 492; *Ryckman v. Hamilton, etc. R. Co.*, 10 Ont. L. Rep. 419, 4 Am. & Eng. Ann. Cases, 1126, and notes on page 1131.

upon himself. For example, the postal clerk takes the risks that are usually ordinary and incident to the riding and working in the postal car, and should he be thrown down or jolted against the sides of the car while the train is running around curves or coming, necessarily, to a sudden stop, the carrier would not be liable. And so if one should board a freight train as a passenger, and in the usual running of the train should, because of the slackening of the speed, be thrown from his seat and injured, or by the usual and sudden jolting should suffer damages, he would be held to have assumed all the ordinary risks that are incident to such a trip and could not recover from the carrier.

This question was discussed in the case of *Olds v. Railway Co.*,<sup>15</sup> where a passenger was injured while riding upon defendant's freight train. The court say: "From the composition of such a train, and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight trains as there is by passenger trains; but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different because of the inherent hazards incident to the operation of one train, and not to the other; and it is this hazard the passenger assumes in taking a freight train, and not hazard or peril arising from the negligence or want of proper care of those in charge of it."

<sup>15</sup> 172 Mass. 73, 51 N. E. 451; *Le Barron v. Ferry Co.*, 11 Allen, 312; *Heyward v. Railway Co.*, 169 Mass. 466, 48 N. E. 773; *Dodge v. S. S. Co.*, 148 Mass. 207, 19 N. E.

373; *Railway Co. v. Axley*, 47 Ill. App. 307; *Dunn v. Railway Co.*, 58 Me. 187; *Lusby v. Railway Co.*, 41 Fed. 181; *Railway Co. v. Dickerson*, 59 Ind. 317.

## CHAPTER V.

### BAGGAGE OR THE PASSENGER'S EFFECTS.

§ 672. Kinds of baggage.

' 672. Ordinary baggage—Definition.

674 (1) The station in life of the passenger.

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676. (3) The object of the journey.

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693. The baggage of a steerage passenger.

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§ 672. Kinds of baggage.—The baggage or property and effects of the passenger may be divided into three classes. First, the ordinary baggage that is consigned to the carrier's control; second, commercial baggage, or effects which are also consigned to the carrier's control; and third, hand baggage. The law relating to this subject has been for the last twenty-five years or more in a state of evolution, and while the decisions and authorities have been somewhat conflicting, it may be said that the law is now fairly well settled. Within comparatively the last few years a new class of baggage, or property carried by the carrier of passengers, has come into existence and demands the attention and consideration of the courts. It has grown up by reason of



a vast wholesale business that has been transacted through the agency of commercial travelers who carry with them from place to place large sample trunks filled with valuable goods and commodities for the benefit of the trade. The early common-law rules governing the law of baggage gave no place to this, and it has been the duty of the courts to settle and establish, upon the principles of law governing carriers, their duties and liabilities with reference to this business. Technically this is not baggage, but rather commercial effects used not as baggage by the passenger but for the carrying on of his business.

**§ 673. Ordinary baggage—Definition.**—It is difficult to formulate a definition that will embrace all the essentials of the baggage of a passenger; it depends upon so many conditions and circumstances, his station in life, the objects of the journey, his business or vocation,—all must be taken into consideration in arriving at what would be his legal baggage. Is the passenger a young man on his way to enter college, or is he on a journey for recreation? Is he an artist going to the country to sketch, or a military officer on an expedition with his command?

Taking into account these several conditions, it may be said that the baggage of a passenger is such wearing apparel and articles of personal necessity, comfort, conveniences or recreation as would be needed by the passenger on his journey and to accomplish its object; that is to say, it is the ordinary effects that are reasonably needed by one upon his journey and to accomplish its object that are termed ordinary baggage. In determining, therefore, what is baggage, we have to consider (1) the station in life of the passenger, (2) his business or occupation, (3) the object of his journey, (4) whether the effects are personal to him, and (5) are they reasonable in amount for the journey and its objects.

**§ 674. (1) The station in life of the passenger.**—Very much depends upon the station in life of the passenger in determining what effects will be allowed him as baggage upon his journey. It is the ordinary baggage—the ordinary necessities for the comfort and convenience of the particular person—that are allowed. It will be readily seen that the man or woman who lives in luxury and affluence will ordinarily use different apparel and articles of comfort than a poor man or woman living and occupying a different station in life. One of the royal family of England, or of any of the countries of the old world, would no doubt

carry different effects upon a journey than a man engaged in the ordinary pursuits of life.<sup>1</sup>

§ 675. (2) **The business or occupation of the traveler.**—The business or occupation of the passenger must necessarily have very much to do with the baggage he would ordinarily carry. A merchant on his way to the manufacturing city to buy goods would carry different baggage than a drover in charge of a car of live stock. Mr. Justice Field, in *Railway Co. v. Swift*,<sup>2</sup> said: "The contract to carry only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending of course upon the station in life of the party, the object and length of his journey, and many other considerations." Holding that surgical instruments in the case of a surgeon in the army traveling with troops constituted a part of his baggage, the court say: "The value of the surgical instruments was properly included; instruments of that character in the case of a surgeon in the army traveling with troops may properly be regarded as part of his baggage; he may be required to use these instruments at any time, and must accordingly have them near his person where they can be had upon a moment's notice."

§ 676. (3) **The object of the journey.**—The law seeks to recognize that as baggage which is necessary for the comfort and convenience of the traveler on his journey and in accomplishing

<sup>1</sup> *Hurwitz v. Hamburg, etc. Packet Co.*, 56 N. Y. Supp. 579. In *Matz v. Railway Co.*, 85 Cal. 329, it was held that ladies' jewelry is not a proper article of baggage to be carried in the trunk of a man traveling alone so as to render the carrier liable for its value in case of its loss, at least when it is placed in the trunk simply for the purpose of having it transported. But in *McGill v. Rowand*, 3 Pa. St. 451, it was held that where a man was traveling with his wife, whose jewelry was in a trunk, that it might well be held that the jewelry was intended for the use of

the passenger while traveling. In *Railway Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531, it was said, whether an article of wearing apparel in any particular case constitutes baggage, as that term is understood in the law, for which the carrier is responsible as an insurer, depends upon the inquiry whether it is such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling.

<sup>2</sup> 79 U. S. (12 Wall.) 272, 2 L. Ed. 428; *Macrow v. Railway Co.*, L. R. 6 Q. B. 621.

its object. Illustrations are numerous. The artist going upon a sketching tour would need paints, brushes, easels, and that which would be necessary and convenient for his work, and such effects would be legally held to be his baggage; but if the same individual should be traveling to the wedding of his friend, or on a fishing or hunting trip, his artist's tools would hardly be considered as baggage, but instead he would naturally take with him clothing and baggage suitable to the object of his journey; if hunting or fishing, his hunting suit, guns, ammunition, and such articles as would be needed on the trip.

§ 677. (4) **The effects must be personal to the traveler.**—It has been held with great unanimity that the effects carried as baggage must be personal to the passenger. As where a wife purchased books for her husband while abroad with money which he remitted to her for that purpose and packed them among her baggage, it was held in an action for loss of the baggage and personal effects that she should not recover, as the books did not constitute a part of her personal effects.<sup>3</sup> On the other hand, where “a catalogue prepared by a traveling salesman at his own expense, and which was his own individual property and carried with him as an article convenient and necessary for use in his business while traveling, was lost with other articles in a valise, it was held that he could recover for it upon the grounds that it was an article of personal baggage.”<sup>4</sup>

In *Oakes v. Railway Co.*<sup>5</sup> it was held “that baggage is confined to such articles as are usually carried as baggage for the personal use of the passenger, or for his convenience, instruction or amusement on the journey, and does not include that which is carried for the purpose of business, such as merchandise or the like.” And it has been said that whatever the passenger takes with him for his personal use or convenience, either with reference to the immediate necessities or the ultimate purpose of the journey, must be considered personal baggage. And again, baggage is such articles as it is usual for persons traveling to take with them. And so it has been universally held that money necessary for the payment of the expenses of a journey, which is carried in the trunk of a passenger, is part of his baggage, and,

<sup>3</sup> *Hurwitz v. Hamburg, etc. Packet Co.*, 56 N. Y. Supp. 579.

<sup>4</sup> *Staub v. Kendrick*, 121 Ind. 226, 6 L. R. A. 619.

<sup>5</sup> 20 Oreg. 392, 12 L. R. A. 318.

if lost while in the custody of the carrier for transportation, the carrier would be liable.<sup>6</sup>

In *Railway Co. v. Berry*<sup>7</sup> the court say: "The carrier is liable, as insurer, for money which the passenger, *bona fide*, includes in his baggage to pay traveling expenses, and for personal use on his journey, provided no more is taken than is necessary or usual for the passenger of like station, habits and condition in life on similar journeys. For any amount in excess of this . . . the carrier is not liable, as such, unless he receives it with notice that the quantity is greater than is usually carried by passengers under the same or similar circumstances."

In *Runyan v. Railroad Co.*<sup>8</sup> the court, summing up the question as to what is baggage, say: "He (the passenger) was entitled to take with him, for use, his personal baggage appropriate to the journey and its object; that is, not only wearing apparel for use and ornament, but also other articles, all within reasonable limit, the use of which was personal to him during his journey and in accomplishing its purposes. To illustrate the character of such articles other than wearing apparel, it is settled that a sportsman journeying for sport may take his gun case or fishing apparatus,<sup>9</sup> an artist may take his easel when he is on a sketching tour,<sup>10</sup> and a student in pursuit of study may take his needed books and manuscripts."<sup>11</sup>

§ 678. (5) **Must be reasonable in amount for the journey and its objects.**—It is that which is necessary for the comfort and convenience of the passenger while on his journey, and for the accomplishment of the objects of the journey, that is legally considered to be his baggage. The passenger's personal convenience is the prime consideration. By these necessities the amount of his baggage is limited; it could not reasonably be otherwise, else the passenger might transport large quantities of goods, and the space and power of the carrier devoted to the

<sup>6</sup> *Brown v. Grand*, 9 Wend. 85; Dec. 44; *Angell, Carr.* 115; 2 *Merrill v. Grinnell*, 30 N. Y. 594; *Beach, Railways*, 59.

*Fairfax v. Railway Co.*, 73 N. Y. 167.

<sup>7</sup> 61 N. J. 537, 43 L. R. A. 284.

<sup>8</sup> 60 Ark. 433, 28 L. R. A. 501; *Hutch. on Car.* 682; *Schoul. Bailm.* 669-71; *Story, Bailm.* 499;

<sup>9</sup> *Hawkins v. Railway Co.*, 6 Hill (N. Y.), 586, 41 Am. Dec. 767.

<sup>10</sup> *Merrill v. Grinnell*, 30 N. Y. 619.

<sup>11</sup> *Hopkins v. Wescott*, 6 Blatchf. 64.

hauling of baggage would, of necessity, be very much increased. As has been said, "the company may rely upon the implied representation that whatever is offered by the passenger as baggage is that and nothing else. If it be baggage, the baggage goes under the contract to carry; if it is not, it does not."<sup>12</sup>

§ 679. **What is not baggage.**—As we have seen, the articles carried must be personal to the passenger and for use upon the journey, or the objects of it, and reasonable in amount; and so any articles that are carried merely for transportation are not in a legal sense the baggage of the passenger. And if it should appear that a larger amount of money or other effects than were necessary for the expense of or use on the journey, and that which is incident to it, were carried by a passenger in his trunk without the knowledge of the carrier, it could not be held to be baggage. Or, if goods were transported in the trunk of the passenger to be delivered at the end of the journey to some other person, or to be sold, or used for some other purpose than that which would be considered for the personal use of the passenger, such goods would not be considered baggage.<sup>13</sup> The congress of the United States has deemed it necessary to enact a statute with reference to the various valuable articles shipped as freight or baggage on vessels.<sup>14</sup> And it has been held that under this statute a lady's lace shawl made exclusively of Chantilly lace, under the particular circumstances, was not baggage.<sup>15</sup> And where the plaintiff's trunk, which was checked, contained among other goods bank-notes of a large amount, it was held that such money could not be considered as included under the term "baggage" so as to render the carrier liable for it.<sup>16</sup> So watches of great value, which were not incident to the journey, contained in a traveling case, and additional to the one that was worn upon the person of the passenger, a sack or a muff, or a napkin-ring carried by a male passenger, have been held not to be legally baggage, for to hold them to be baggage would be in

<sup>12</sup> *Stimson v. Railway Co.*, 98 Mass. 83; *Railway Co. v. Bowler, etc. Co.*, 63 Ohio St. 274; *Railway Co. v. State*, 65 Ark. 363, 41 L. R. A. 33; *Railway Co. v. Swift*, 79 U. S. (12 Wall.) 272; *Railway Co. v. McGahey*, 63 Ark. 344, 36 L. R. A. 781.

<sup>13</sup> *Stimson v. Railway Co.*, 98

Mass. 83; *Humphreys v. Perry*, 148 U. S. 627, 37 L. Ed. 587; *Railway Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531.

<sup>14</sup> U. S. R. S., sec. 4282.

<sup>15</sup> *Ocean S. S. Co. v. Way*, 90 Ga. 747, 20 L. R. A. 123.

<sup>16</sup> *Bank v. Brown*, 9 Wend. 85.

violation of the rule that the effects must be personal to the convenience, comfort, instruction or entertainment of the passenger.<sup>17</sup>

In *Oakes v. Railway Co.*<sup>18</sup> it was held that articles of whatever kind that do not properly come within the description of ordinary baggage are not included within the terms of such contract, nor is the carrier liable for their loss or destruction in the absence of negligence. So stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business, therefore they do not fall under the denomination of baggage.

§ 680. — **Sample trunks or commercial effects.**—As we have seen, the carrier is bound to carry for the passenger his baggage—such baggage as is personal to him and belongs to what is termed “ordinary baggage,” as applied to the particular person and the particular journey; but he is not bound to carry articles of merchandise, or that which is not ordinary baggage, unless he consents to carry them as such after having notice, either express or constructive; that is, such notice as would be indicated by facts, circumstances or observation that the articles are not baggage. There should be notice of some kind to the carrier that the articles contained in the trunk or package are not the personal baggage of the passenger. Such notice is often inferred from the appearance of the package containing the articles, or from the knowledge of the servants of the carrier that the passenger is engaged in the business of carrying such articles. The business carried on by commercial travelers through the country has come to be so well understood that it is not difficult to discern which are the sample trunks and which the trunks supposed to contain personal baggage. In *Sloman v. Railway Co.*<sup>19</sup> it was said: “It does not appear that it was stated, in terms, to the baggagemaster what the trunks contained, but the jury had the right to consider the surrounding circumstances, the appearance of the passenger and of the articles, the conversation between the passenger and the baggage-master, and

<sup>17</sup> *Railway Co. v. Boyce*, 73 Ill. 510; *Belfast v. Railway Co.*, 9 H. L. 556; *Railway Co. v. Shepherd*, 8 Exch. 30.

<sup>18</sup> 20 Oreg. 392; *Wilson v. Railway Co.*, 56 Me. 62.

<sup>19</sup> 67 N. Y. 208; *Talcott v. Railway Co.*, 159 N. Y. 661, 54 N. E. 1.

the dealings between them; and if they indicated that the trunks were not ordinary baggage, or received or treated as such, the jury had the right to draw the inference of notice, and that they were received as freight." And where a sample trunk was checked "without any misrepresentation, and without any release of liability or any request therefor, on payment of a charge for excess baggage, which was the same for sample trunks as for ordinary baggage, and the baggageman had constructive notice of the character of the trunk from its appearance and from other circumstances, although there was a rule of the company prohibiting the checking of sample trunks without a release of liability," it was held in an action for the loss of the trunk that the railroad company was liable; that from the surrounding facts and circumstances the carrier was chargeable with notice that it was a commercial traveler's trunk, the court saying: "This court has held that notice may be given to the common carrier by other means than the direct statement of the owner that he is a commercial traveler and that his trunk contained samples."<sup>20</sup>

Where the carrier knowingly permitted passengers, without payment of any extra charge, such passengers having purchased tickets for their transportation, to take articles as personal baggage which were not properly such, it was held that the carrier was liable for their loss and destruction as insurers of such baggage in the same manner and to the same extent as if the goods were freight.<sup>21</sup> The court say: "While it is true that passenger carriers are not liable for merchandise and the like when

<sup>20</sup> Trimble v. Railway Co., 162 N. Y. 84, 48 L. R. A. 115.

<sup>21</sup> Oakes v. Railway Co., 20 Oreg. 392; Story on Bailm. 499; Railway Co. v. Shepherd, 8 Exch. 30; Sloman v. Railway Co., 6 Hun, 546. The court say: "As to the liability of the carrier, they are liable if they knowingly undertake to transport merchandise in trunks or boxes which have been received by them for transportation in passengers' trunks, unless the agent who receives the packages for that purpose violates a regulation of the company by so doing, notwithstanding the passenger or owner of the

goods has notice of such regulation." Butler v. Railway Co., 3 E. D. Smith, 571; Hanes v. Railway Co., 29 Minn. 161; Railway Co. v. Capps (Tex.), 16 Am. & Eng. Ry. Cases, 118. Held, where a railroad company, through its baggage or ticket agent, receives articles for transportation as baggage knowing at the time that such articles are not properly baggage, the company will be responsible therefor as a common carrier, and will be estopped from denying that the same was not baggage. Railway Co. v. Conklin, 38 Kan. 55; Hoeger v. Railway Co., 63 Wis. 100.

packed with the traveler's baggage if the baggage be lost, yet if the merchandise be so packed as to be obviously merchandise to the eye, and the carrier takes it without objection, he is liable for the loss." The rule, of course, would be otherwise if the passenger by deceit or misrepresentation procured the shipment of articles that were not properly baggage, as baggage, or if there was no such constructive notice as has been mentioned, and the facts were not known to the servants of the carrier that the trunks or packages contained articles not baggage; in such case the carrier would not be liable as an insurer for the value of such articles if they were lost, and his liability could only be based upon his fault or negligence resulting in the loss of the property.

§ 681. — **Payment of excess baggage.**—The implied contract to carry the ordinary baggage of the passenger rests upon the consideration paid for his transportation; and if articles not baggage, such as merchandise or samples of traveling men with the knowledge of the carrier, or after having notice of the contents of the trunks or packages, are carried as baggage, the same consideration will support the implied contract to safely carry, and the carrier will be liable as if it were ordinary baggage; but carriers generally have made a regulation as to how many pounds of baggage the passenger will be allowed, and that all over that amount shall be charged as excess baggage and certain rates paid for its carriage; and in case it is merchandise or such articles as are not baggage, that a release of their liability as insurers shall be given them. Such regulations have been generally conceded reasonable and binding, so a further and another consideration is generally charged and paid to support the contract for the carriage of excess baggage, and this contract creates a somewhat different relation. The duties and liabilities, however, of the carrier of passengers are the same whether the articles are carried as baggage or upon a contract supported by payment of consideration to carry them as excess baggage.

§ 682. — **Reasonable regulation.**—The carrier of passengers may make regulations touching its duties and liabilities as to baggage, but such regulations must be reasonable, and their reasonableness is a question for the jury.<sup>22</sup> It has been held

<sup>22</sup> *State v. Overton*, 24 N. J. L. Co., 45 N. J. Eq. 67, 6 L. R. A. 235, 61 Am. Dec. 671; *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. R. A. 535; *Railway Co. v. Stockyard*, 855; *Coffee v. Railway Co.*, 25 So. 157.



that the carrier cannot suddenly and without notice to its customers change its customs and regulations not acquiesced in.<sup>23</sup> And where a carrier had printed upon the ticket delivered to the passenger, "Good for one continuous passage in either direction between New York and Elizabeth, N. J. No stop-off allowed. Free transportation allowed for 150 lbs. baggage (wearing apparel) only, and company's liability expressly limited to \$1.00 per lb.," and where the passenger with such a ticket undertook to board a train of the defendant carrying certain packages in his hands which were not personal baggage, and was prohibited by the servants of the company for the reason that the company did not permit its passengers holding such a ticket to carry such packages upon its train, it appearing that the custom for a long time had been otherwise and the passenger had no notice of any change or other regulation, the court, in an action for damages, held the defendant liable, and in the opinion say: "We think if the defendant company had, previous to the denial of admission of the plaintiff to their cars complained of, for a long time acquiesced in, and made accommodations for, the carriage of small packages of merchandise of its passengers as personal baggage, so as to lead them to accept and rely upon its attitude in that respect as one of its regulations, that it could resume its right under the law only after reasonable notice of its rescission of the regulations so made. It could not suddenly enforce the right resumed against passengers who were, in good faith, traveling in reliance upon the previous regulation, without reasonable notice, and ignorant of, and unprepared for, any change in it."<sup>24</sup>

§ 683. — **Good faith.**—Good faith and fair dealing is required of the passenger toward the carrier. If from the appearance of the trunk delivered to the carrier for transportation as his baggage, or from the circumstances appearing at the time, the carrier could not discover that the effects being carried were baggage—that the contents of the trunk, or receptacle, was goods or property other than baggage, he would not be held liable for its loss; in such case the passenger is bound to give the carrier notice of the contents of the trunk and obtain his acquiescence

<sup>23</sup> Runyan v. Railway Co., 61 N. J. 537, 43 L. R. A. 284; Trimbull v. Railway Co., 162 N. Y. 85.

<sup>24</sup> Runyan v. Railway Co., 61 N. J. 537, 43 L. R. A. 284.

to carry it as baggage if he would make him liable. The law will not permit the passenger by trick, or secret packing away of articles not baggage, of which the carrier has no knowledge, to hold him liable for their loss or injury. In *Railway Co. v. Berry*<sup>25</sup> the court say: "The passenger must observe the utmost candor and good faith in presenting his baggage for transportation, for the carrier is only required to transport according to appearances. If the passenger presents his baggage in a closed receptacle, such as is ordinarily carried as baggage, in order to lay upon the carrier the extraordinary responsibility of insurer, the passenger must inform him if it contains any articles which the carrier is not bound to transport as baggage. This for the reason that the carrier, when thus notified, may refuse to carry altogether, or accept and charge an additional sum to the passenger's fare for the onerous liability he thus assumes."

§ 684. **The owner of the baggage should be a passenger.**—The contract for carrying the baggage is incident to the contract for the carriage of the owner as a passenger, and, as we have seen, it rests upon the same consideration. It would therefore follow, if the owner of the baggage is not a passenger, the liability of the carrier, as a carrier of passengers, could not exist, and if liable at all it must rest upon other grounds. If the carrier had consented to carry the baggage and received a valuable consideration for it, he would, of course, become liable as a common carrier of freight; if he consented to carry it without compensation, he would be liable as a gratuitous bailee, liable only for gross negligence.<sup>26</sup>

§ 685. **Should the owner accompany the baggage.**—If the relation of passenger and carrier exists between the carrier and the owner, it would not be necessary that he should go upon the same train or boat with the baggage, if the circumstances were such that the carrier could be said to have had notice and consented, or if the carrier had sent the baggage by another train, or by another line, without consulting the passenger, and without his consent. It has been held that when a passenger making

<sup>25</sup> 60 Ark. 433, 28 L. R. A. 501, citing Schoul. Bailm., sec. 669 et seq.; Hutch. Carr., sec. 685; Edw. Bailm., sec. 529; 3 Wood, Railway Law, secs. 401, 406, 408; Railway Co. v. Fraloff, 100 U. S.

24; 2 Beach, Railway Law, 902; Davis v. Railway Co., 22 Ill. 278 and other authorities.

<sup>26</sup> Collins v. Railway Co., 10 Cush. (Mass.) 506

a journey over connecting lines holds tickets over such lines, and, desiring to proceed upon his journey, found his baggage had not arrived so he could check it for the train he was about to take, and the carrier agreed to send it when it did arrive, by the first train, that in such case the carrier would be held to the usual liability.<sup>27</sup> But if there is no agreement or consent or voluntary sending by a different way by the carrier, it seems that the carrier is entitled to have the owner accompany his baggage, for the reason that to some degree it might lessen the liability of the carrier, as in case of disaster by wreck or fire, or some other loss, especially at the destination point, for in such case the passenger might relieve the carrier of the baggage, and thus save its loss or destruction. A case often cited is *Collins v. Railway Co.*<sup>28</sup> where the passenger went by a different train upon the same road and the goods were lost without any gross negligence of the carrier, or any conversion by him; it was held that the carrier was not liable for the loss. The court say: "It is easy to perceive that the omission of the plaintiff to accompany them (the baggage), as he informed the defendant's agent he should, contributed materially to the loss, and that what might have been a very proper and suitable disposition of them at the station at Lawrence, under the reasonable belief that the owner of them was present to take charge of them, might have been one of hazard and exposure to loss in his absence."

Where a carrier received baggage under the mistaken supposition that it belonged to passengers who had purchased tickets over its road, and that the transportation of the baggage was consequently paid for; and without intending to make any charge for the transportation, and the owner of the baggage erroneously supposed that in purchasing tickets to the destination of the baggage over another road he had paid for the transportation by the carrier to which he had delivered the baggage, it was held that there was no implied contract for the transportation of the baggage, and that the carrier owed to the owner the duty only of abstaining from anything amounting to wilful or wanton injury to his property while in its possession, and that

<sup>27</sup> *Warner v. Railway Co.*, 22 Iowa, 176. In *Graffin v. Railway Co.*, 67 Me. 234, 15 Am. Ry. Rep. 372, it was held that the railroad

company was not obliged to receive as baggage the trunk of one who does not go by the same train.

<sup>28</sup> 10 Cush. (Mass.) 506.

the carrier was not liable for its destruction in common with their own property caused by attempting to run the train in which it was placed upon an unguarded bridge, which was and long had been so defective that it could not stand such a burden.<sup>20</sup> But it has been held that it would be sufficient if the baggage was accompanied by one who had an interest in the baggage, and who ordinarily would represent the owner of it; as, for example, where the wife of the owner accompanied the baggage.<sup>20</sup>

§ 686. **Baggage of one riding upon a free pass.**—If there is no consideration for the carriage of the passenger—if it is a mere gratuity,—then there can be no consideration for the contract incident to it, and the carriage of the baggage is gratuitous; therefore the carrier in that case would be a bailee for the sole benefit of the bailor and subject only to the liability of such a bailee. The rule would be different, however, if there was a consideration for the giving of the pass, as where some service was rendered the carrier.

§ 687. **Liability of the carrier for baggage under his exclusive control.**—It may be said generally that for baggage of the passenger that is under the exclusive control of the carrier, the liability of the carrier is that of an insurer, or of a carrier of goods.<sup>21</sup> Here as in cases of loss or injury of freight the authorities are not entirely harmonious as to which carrier is liable where the loss occurs upon a connecting carrier's line. Where baggage is checked to the destination of the passenger, upon a through ticket to transport him over roads of initial and connecting carriers, and is lost, which carrier is liable to the passenger for the loss? The same rule would no doubt obtain in such case as is applied to cases of loss of freight. Some of the courts

<sup>20</sup> *Curtis v. Railway Co.*, 74 N. Y. 116-121. For full discussion as to passenger accompanying his baggage see *Marshall v. Pontiac*, etc. R. Co., 126 Mich. 45, 55 L. R. A. 650. And opposed to this see *McKibbin v. Wisconsin C. R. Co.*, 100 Minn. 270, 8 L. R. A. (N. S.) 489, 110 N. W. 964.

<sup>20</sup> *Beers et ux. v. Railway Co.*, 67 Conn. 417, 34 Atl. 541. Baggage of a passenger riding on a

free pass. *White v. St. Louis*, etc. Co. (Tex. Civ. App., 1905), 86 S. W. 962.

<sup>21</sup> *Seasongood v. Railway Co.*, 14 Ky. L. R. 430; *Bank v. Brown*, 9 Wend. 851, 21 Am. Dec. 129. When shipped over different routes by the agent of the company, liable as an insurer. *Estes v. Railway Co.*, 7 N. Y. Supp. 574; *Hubbard v. Mobile*, etc. R. Co., 112 Mo. App. 459, 87 S. W. 52.

hold that if there is no agreement for through shipment either express or implied on the part of the initial carrier, he can only be held for the safe transportation over his own line and delivery to the connecting carrier while others hold that by the act of accepting the goods directed to a destination beyond his own line he by such acceptance impliedly agrees to deliver them as directed.<sup>22</sup>

§ 688. **Hand baggage.**—In determining what articles are legally hand baggage the same rules apply that have already been discussed. By hand baggage is meant those smaller articles of baggage usually carried in hand bags, valises or such like small packages; such articles of apparel as are necessary to the comfort and needs of the passenger on his journey, and which he usually keeps near him while being transported in the vehicle of the carrier. It may include an amount of money carried in his valise or traveling bag, or under some circumstances in his clothing, carried for the expenses of his journey and consisting of a reasonable amount for other purposes. The question of the duty and the liability of the carrier seems to depend upon who has the custody or control of the baggage. If the passenger has the entire custody and control of the baggage to the exclusion of the carrier, if, as has been said, “there exists the *animo custodiendi* on the part of the traveler to the exclusion of the carrier,” then the carrier cannot be held as an insurer as in the case of baggage in the entire custody and control of the carrier, and will not be liable at all unless guilty of negligence which results in its loss or damage, in the absence of contributory negligence on the part of the passenger. The cases are numerous upon this subject. Where a passenger’s baggage was placed on a seat near an open window, by the porter of the car, and while the car was standing in the depot the passenger left the car, but his wife, who was traveling with him, remained within and walked up and down the aisle, then went out on the platform, and then sat down in a seat facing the baggage, and the baggage was stolen, it was held in an action for the loss that it was

<sup>22</sup> *Ante*, § 530; Kansas City, etc. R. R. Co. v. Washington, 74 Ark. 9, 69 L. R. A. 65, and notes collecting cases as to liability of initial carriers generally, and rights of passengers on connect-

ing roads. Where passenger checked baggage on a through ticket, carrier held liable to destination. *Hutchins v. Pa. R. Co.*, 181 N. Y. 186, 73 N. E. 972.

a question for the jury whether the passenger or his wife was negligent.<sup>33</sup> And where a passenger who was attempting to close the car window dropped her traveling bag out of the window, it was held she could not recover, though the bag contained articles of great value, and the conductor, who was at once requested to do so, refused to stop the train to enable the passenger to recover the property. In the opinion of the court, Mr. Justice Grey said: "She did not intrust her traveling bag to the exclusive custody and care of the defendant's servants, but kept it in her own immediate possession without informing the defendant of the value of its contents until after it had dropped from her hands through the open window." But where a passenger surrendered his hand baggage to the agent of a transfer company to be conveyed from one depot to another, and it was lost, the company was held liable; this, of course, rested upon the fact of the control of the baggage being in the transfer company.<sup>34</sup>

§ 689. **Sleeping-car companies.**—The duties and liabilities of sleeping-car companies to care for hand baggage and personal effects of the passenger taken into their cars has already to some extent been discussed.<sup>35</sup> The question is one of negligence, to be determined by all the circumstances of the particular case. It may perhaps be said that greater care of the baggage and effects of the passenger is required of the sleeping-car company than of the servants employed upon the ordinary day-coach of a railroad company; that is to say, ordinary diligence in the one case would be a greater degree of diligence than in the other, because the sleeping-car company holds out to the public that they will assume the duty of caring for the passenger and his effects which are placed in the care of their servants.

§ 690. **Liability for theft of servants.**—The passenger impliedly has the guaranty of the company that its servants can be trusted, and if they steal from the passenger his baggage or effects the company is liable. Where the master, by contract or by operation of law, is bound to do certain acts, he cannot excuse himself from liability upon the ground that he has committed that duty to another, and that he never authorized such person to do the particular act. Being bound to do the act, if he does

<sup>33</sup> *Dawley v. Palace Car Co.*, 169 Mass. 315.

<sup>34</sup> *Staub v. Kendrick*, 121 Ind. 226.

<sup>35</sup> *Ante*, § 641 *et seq.*; *Dawley v. Palace Car Co.*, 169 Mass. 315.

it by another he is treated as having done it himself; and the fact that his servant or agent acted contrary to his instructions without his consent, or even voluntarily, will not excuse him.<sup>36</sup>

§ 691. **A high degree of ordinary diligence required.**—The liability of the sleeping-car company for the baggage of its passengers is not that of an insurer, but the company is held to ordinary diligence and watchfulness over the effects of its passengers placed in its custody; and it may be said that this ordinary diligence, because of the circumstances and surroundings, and because of the fact that the passenger has submitted his effects, if not his own safety, to the watchful care and diligence of the servants of the sleeping-car company at night while he sleeps, would demand a very high degree of diligence. All his effects are surrendered to the vigilance and watchfulness of the servants of the company, and he is dependent upon them for their care and custody, and so in such case it would seem that it is, at all events, a higher degree of ordinary care that will be required of the company.<sup>37</sup>

§ 692. **Mixed custody of passenger and carrier—Is the liability of steamship company and innkeeper the same?**—A distinct and separate class of cases, with different phases of liability, are cases where the custody of the baggage may be said to be "a mixed custody of the passenger and the carrier;" as, for example, where the baggage is placed in the state-room of the passenger upon the steamer and he is given the key to the room, or in the compartment of the car upon which he is being conveyed, which he occupies exclusively and of which he has the entire control. So great is the similarity between an inn or hotel and a passenger steamship where the passengers are roomed, boarded and cared for upon their voyage, that some of the courts have declared that it is a floating inn, and that the liability of the steamship company operating these great lines of steamers

<sup>36</sup> Wood, Master and Servant, sec. 321; Pullman Car Co. v. Gavin, 93 Tenn. 53, 21 L. R. A. 298; Pullman Car Co. v. Mathews, 74 Tex. 655; Pullman Car Co. v. Martin, 95 Ga. 314, 29 L. R. A. 498; Ill. Cent. R. Co. v. Handy, 63 Miss. 709.

<sup>37</sup> A sleeping-car company is not liable as an insurer of a passen-

ger's effects, but only as a bailee for hire. Root v. Sleeping-Car Co., 28 Mo. App. 199; Efron v. Pullman Car Co., 59 Mo. App. 641; Sleeping-Car Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102. Bound to use reasonable care, etc. Lewis v. Sleeping-Car Co., 143 Mass. 267; Carpenter v. Railway Co., 124 N. Y. 53.

is the same as that of an innkeeper. The similarity certainly exists and the argument is one of great force. A room is assigned to the passenger where he can sleep at night, and stay if he desires through the day; he is given a key to the room, and may appropriate it as fully and exclusively as does a guest at a hotel. His baggage is taken to his room as it is at a hotel; the servants of the steamship having charge of this department have access only to attend to the wants of the passenger and to attend to keeping the room in order as in a hotel; when he leaves his room he may lock the door and take with him the key as at a hotel; if he has valuables he may, and is generally requested to, deposit them with the purser of the boat for safe-keeping; his meals are served in the dining-room of the steamer, and he lives upon the steamer the same as he lives at a hotel; the custody of his baggage is a mixed custody of himself and the carrier, as at a hotel it is a mixed custody of himself and the hotel proprietor or his servants. The authorities, however, do not agree upon this question, but it would seem that the greater force of reasoning, which means the greater weight of authority if not the greater number of cases, is with the contention that such steamships are liable as innkeepers, though some of the authorities contend with a considerable degree of force that steamships are not floating inns, and that the steamship company's liability is not the same as that of an innkeeper; and that to hold the steamship company for loss of baggage that is in the custody of the passenger it is necessary to show that the carrier was guilty of negligence which resulted in its loss or injury.<sup>33</sup>

The supreme court of Michigan divided upon this question in

<sup>33</sup> An ocean steamship company is not responsible as a common carrier or an innkeeper for the baggage of a passenger which he keeps in his own possession in his state-room, but must answer in such cases for its negligence like other ballees for hire. *American Steamship Co. v. Bryan*, 83 Pa. St. 446. And *Clark v. Burns*, etc. Co., 118 Mass. 275, held "the owner of a steamship carrying passengers for hire is not an innkeeper, although the passenger

pays a round sum for transportation, board and lodging." In *Abbott v. Bradstreet*, 55 Me. 530, it was held the carrier was not liable for money stolen from the pocket in absence of proof that the robbery was by one of the employees. Steamship company not liable for wearing apparel or money which is not delivered to the officer of the boat for safe-keeping. *Crystal Palace v. Vanderpool*, 55 Ky. 302; *Del Valle v. Richmond*, 27 La. Ann. 90.



*McKee v. Owen*; <sup>30</sup> Judge Christiancy and Judge Cooley holding that the steamship is an inn, and that the liability of baggage lost or injured is that of an innkeeper. The opinion of Judge Christiancy is strong and lucid. He says in part: "But when a steamer is fitted up with regular sleeping apartments, and all the appliances for boarding and lodging her passengers as at an inn, and the owners or managers hold themselves out to the traveling public as furnishing such accommodations, and by these superior advantages induce travelers (as they naturally must) to prefer this to the less comfortable mode of traveling by railroads and stage-coaches, or even by vessels without such accommodations, when they receive the fare of a passenger, which includes not only his passage, but his board and sleeping room and bed, and when that room is assigned to him and he retires to it for the night, the whole transaction, it seems to me, carries with it an invitation to make use of the room and the bed for the purposes and in the manner for which they were obviously designed; in other words, to lay aside his clothing and go to sleep there. And unless he is expected to sleep with his eyes open, and his faculties upon the alert, he is invited to lay aside all the vigilance he would be expected to exercise when awake, and to trust himself and his clothing and such money and property as he may have about him, and as it is usual for passengers to carry in their clothing, to the protection afforded by the room, and the vigilance to be exercised by those in charge of the boat. And the latter must, in the absence of any usage, request or notice to the contrary, be held to assent that the passenger shall leave such clothing and contents at any convenient place in the room, instead of having to call the steward, clerk or other officer or servant of the boat to take it into his actual or manual custody — a proceeding which (as it must take place after the passenger is undressed) would be somewhat awkward in the case of a lady passenger at least. And, having been thus invited to rely upon the protection of his room, and their vigilance instead of his own, the invitation, it seems to me, carries with it an assurance that they will be responsible in the meantime for all losses of such clothing and contents, from which he might by his own vigilance have protected himself when up and awake. If they do not thereby assume the responsibility, then it is no 'figure of speech,'

<sup>30</sup> 15 Mich. 115-129.

but a literal truth, to say that by their invitation the passenger has been lulled into a false security. I express no opinion upon the question whether the liability of the defendants in respect to the loss of such money and property in other modes or from other causes would be commensurate or identical with that of an innkeeper. The facts of this case do not call for an opinion upon a question as broad as this. But so far as relates to the facts of this case, the loss of this money and chain in the manner and under the circumstances the evidence tended to prove, I think the assurance held out by the defendants to the plaintiff is the same as that held out by the innkeeper to a guest occupying a bed-room at his inn; and that the responsibility of the defendants for the loss of the chain and so much of the money as should be found reasonable for the expenses of the journey is the same as that of the innkeeper for a loss occasioned in the same way; and that the responsibility rests upon precisely the same, and all the same reasons in both cases; and this, whether the money and chain were stolen through the window from without, or by the stranger lady who had been assigned to, and occupied the room with, the plaintiff, without any choice or agency of hers, but by the act of the proper authorities of the boat. Had the lady been a traveling companion of the plaintiff, the case, as to this point, would have been different, and so, probably, if she had been assigned to the same room at the plaintiff's request."

A late case in New York (*Adams v. Steamboat Co.*<sup>40</sup>) holds to the same doctrine, where money was taken from the clothing of the passenger occupying a state-room during the night, the doors being locked and the windows fastened. The court say: "The relations that exist between a steamboat company and its passengers, who have procured state-rooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests. The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that were originally supposed to furnish a temptation to the landlord to violate his duty to the guest. A steamer carrying passengers upon the water, and fur-

<sup>40</sup> 151 N. Y. 163, 34 L. R. A. Smith (N. Y.), 453; *Mudgett v. 682*; *Purvis v. Coleman*, 21 N. Y. Bay State, etc., 1 Daly (N. Y.), 111; *Van Horn v. Kermit*, 4 E. D. 157.

nishing them with rooms and entertainment, is for all practical purposes a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations."

§ 693. **The baggage of a steerage passenger.**—The baggage of a steerage passenger is usually taken possession of by the passenger, and his possession is exclusive to himself, thus relieving the steamship company from liability as an insurer, their liability only resting upon proof of negligence upon the part of the carrier which resulted in the loss or injury of the baggage. And where a steerage passenger took entire charge and control of his baggage, taking it into the steerage, placing it under his berth and fastening it to his berth with ropes, and during the voyage it was stolen, it was held that the steamship company was not liable.<sup>41</sup>

§ 694. **Termination of liability.**—The object of the contract to carry the baggage, which we have seen is an implied contract, is to deliver it at the end of the journey, or to the passenger who procured it to be carried where he shall demand its delivery. Upon the part of the passenger it is presumed that he is anxious to receive it at once upon its arrival; upon the part of the carrier, that he is ready and willing to deliver it to the passenger at once upon its arrival at the place of destination. The liability of the carrier terminates upon delivery to the passenger of his baggage in good condition at the end of his journey, or wherever it may be called for by the passenger and delivered to him by the carrier. So it follows that it is the duty of the carrier to safely carry the baggage, and of the passenger to at once upon his arrival at his destination, or within a reasonable time, to call for and receive it.

The authorities are to the effect, with but very little if any dissent, that it is the duty of the passenger to receive the baggage within a reasonable time, and they generally hold that a reasonable time is not later than the same occasion upon which he arrives at his destination; that it would not be a reasonable time where the passenger waits until the next day before taking the

<sup>41</sup> *Cohen v. Frost*, 9 N. Y. Super. Ct. 335.

baggage away. And so it was held that where a passenger who leaves his baggage upon a depot platform merely because on his arrival after eleven o'clock at night there were no conveyances running by which he could take it away, and it was burned in the depot during the night, that the railroad company was not liable as a common carrier, but only as a warehouseman.<sup>42</sup> The passenger may take his baggage from the custody of the carrier at any time and terminate the relation.

§ 695. **Failure of carrier to deliver baggage.**—The liability of the carrier, of course, depends upon its failure to perform its duty toward the passenger, and so if he fails to deliver the baggage to the passenger when demanded, or at its destination, he would be liable. If, however, the failure of the carrier was the result of the fault or contributory negligence of the passenger, the carrier would not be liable; as where the loss occurred by reason of the passenger taking his baggage, without the consent of the officers of the steamer, to his state-room, which could not be locked and from which it was stolen, it was held the carrier was not liable. But if the loss occurs because of the fault of the carrier, and there is no contributory fault on the part of the passenger, the carrier will, of course, be liable. As where the baggage or property committed to the carrier was brought by its negligence under the operation of natural causes that worked its destruction, or was exposed to such cause of loss, it was held that the carrier was responsible.<sup>43</sup> And so it would follow that a common carrier would not be exempted from liability for a loss, even though it takes place because of an act of God, if the carrier has been guilty of any previous negligence or misconduct which brings the property into contact with the destructive forces of the *actu Dei*, or unnecessarily exposes it thereto.<sup>44</sup>

<sup>42</sup> *Railway Co. v. Lyon*, 123 Pa. St. 140. The responsibility of a railroad company for baggage as a carrier after it reaches the destination of the passenger continues only until he has had a reasonable time and opportunity to take it away. *Railway Co. v. McGahey*, 63 Ark. 344, 36 L. R. A. 781; *Gleason v. Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716. But

see *Chesapeake, etc. R. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566, where baggage retained by the carrier to weigh, and passenger is hindered in getting it. For collection of cases on this question, see notes to above case, 3 L. R. A. (N. S.) 183.

<sup>43</sup> *Wald v. Railway Co.*, 162 Ill. 545, 35 L. R. A. 356.

<sup>44</sup> *Wald v. Railway Co.*, *supra*.

## CHAPTER VI.

### ACTIONS AGAINST COMMON CARRIERS.

#### I. ACTIONS AGAINST COMMON CARRIERS OF GOODS.

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Actions against common carriers, for the purpose of our discussion, will be divided into (1) actions against the common carriers of goods, and (2) against carriers of passengers.

## I.

### ACTIONS AGAINST COMMON CARRIERS OF GOODS.

§ 696. **The basis of the actions.**—These actions are based upon either breach of duty—that duty which the carrier owes to the public as a *quasi*-public servant, as well as the duty he owes to the owner of the goods or the shipper, and are therefore actions *ex delicto*; or upon the contract of affreightment, either express or implied, and therefore actions *ex contractu*.

§ 697. **As to what actions will lie.**—At an early period in the common law, actions against common carriers were based almost entirely upon a breach of their duty to the public, and were therefore actions *ex delicto*, or actions in torts. The theory upon which this rested was that there was a public duty imposed upon carriers that was greater and of more importance than any private contract with their customers, and a breach of that duty was more grave than the breach of a private contract and sounded in tort, and could only be answered for in an action *ex delicto*. In *Bretherton v. Wood*<sup>1</sup> we have an expression from the English court which defines the early common-law rules governing actions against carriers. The court say: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely so that by their negligence or default no injury or damages happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." But the early English opinion that seemed at least to hold to a strong preference for the action on the case instead of the action of *assumpsit* has long since been abandoned, and the action of *assumpsit* upon the contract, express or implied, to safely carry and deliver the goods, has come to be more generally used.

It is said that the departure from the practice established in

<sup>1</sup> 3 Brod. & Bing. (Eng.) 54; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Smith v. Seward*, 2 Pa. St. 342.

England was first settled in the case of *Dale v. Hall*,<sup>2</sup> where it was held that "the permission to carry safely need not be proved; the law raises it. The breach is very right that he did not deliver them safely, but so negligently kept them that they were spoiled." In *Smith v. Seward*<sup>3</sup> the court say: "It was originally the practice to declare against the carrier only on the custom of the realm; but it has long been established that the plaintiff may declare in case or *assumpsit*, at his election; and it is usual to declare in the latter."

The right of action against the carrier may now be either in tort for a breach of his public duty, or it may be in *assumpsit* for a breach of the contract of carriage; either of these actions may be brought by the plaintiff, as he may choose. In *Express Co. v. McVeigh*<sup>4</sup> it was said: "When there is a public employment, from which arises a common-law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing something contrary to an agreement made in the course of such employment, by the party on whom such general duty is imposed."

§ 698. — Even if there is a special contract.—And if there is a special contract to carry, the option still remains to the plaintiff, and he may bring his action either *ex delicto* or *ex contractu*, whichever he chooses, for a breach of duty to carry and safely deliver, or upon the special contract.<sup>5</sup>

§ 699. The advantages of the action *ex delicto*.—There are no doubt some advantages to the plaintiff in bringing the action *ex delicto*. As, for example, where there is uncertainty as to the party defendants, the action *ex delicto* will not be defeated for non-joinder or misjoinder of defendants; the plaintiff can have his judgment against all of them, or any of them against whom he has been able to make a case by his proofs. Nor is it necessary to set out so fully and particularly the facts and circumstances in the declaration as it would be if he declared upon a contract.<sup>6</sup> And so in actions for delay in transporting goods, for negligence or misfeasance in delivering them after transportation, or in an action to recover excessive charges, the plaintiff may bring the

<sup>2</sup> 1 Wills. 281.

<sup>3</sup> 3 Pa. St. 343.

<sup>4</sup> 20 Grat. (Va.) 264.

<sup>5</sup> Nicoll v. Railway Co., 89 Ga.

260; Oxley v. Railway Co., 65 Mo. 630.

<sup>6</sup> Weed v. Railway Co., 19 Wend. 534.

action in tort, *ex delicto*, or an action upon the contract implied or expressed; as, for example, for delay in transportation, the action may be upon the implied contract to safely, and within a reasonable time, transport and deliver the goods; or it may be upon a breach of duty upon the part of the carrier by reason of his failure to do so, which is considered, for the purpose of such action, a public duty of the carrier. As we have seen, it is the duty of the carrier to deliver the goods to the consignee, or to his order, and for failure to do so, or for a misdelivery, he would be liable. And in such case the action may be upon the implied contract, or it may be for a breach of duty upon the part of the carrier. The carrier is only entitled to reasonable compensation; and this is so even though defendant in carrying the goods is governed by the common-law rule only, because demanding and receiving excessive charges, and especially when demanded before he will consent to carry the goods, by the common law, would render him guilty of a breach of duty and liable in an action *ex delicto*, or, as said, at the option of the plaintiff, to an action *ex contractu* as for money had and received.<sup>†</sup>

§ 700. — **For refusal to carry the goods.**—While it is the duty of a common carrier to receive and carry the goods of all who present them for carriage, subject to the exceptions heretofore noted, there is no implied contract to receive them, and a refusal to do so would be a breach of duty on the part of the carrier, and the action for such refusal would of necessity be an action *ex delicto*; but if there had been a special contract to receive and carry the goods, and the carrier refused to carry them, then we need not say that an action would lie for such carriage *ex contractu* for failure to comply with the contract.

§ 701. **The parties.**—The general rules applicable in determining who shall be parties to actions apply in actions against common carriers of goods, and no different or other rules apply. The plaintiff must be one in whom is vested the legal right to compensation or damages; the real party in interest whose rights have been violated, or whose property has been lost or injured, or who is entitled to the performance of the contract or duty in question in the particular case, or the assignee of such a party or his legal representatives. A leading case upon this subject, which has been followed and cited very generally, is the early

<sup>†</sup> *Daws v. Peck*, 8 T. R. 330.



English case of *Daws v. Peck*,<sup>8</sup> where the subject was very generally discussed by Lord Kenyon. In rendering the opinion he said: "I cannot subscribe to one part of the argument urged on behalf of the plaintiff, namely, that the right of property on which this action is founded is to fluctuate according to the choice of the consignor or consignee, and that consequently either of them may at his pleasure maintain an action against the carrier for the non-delivery of the goods. In my opinion the legal rights of the parties must be certain and depend upon the contract between them, and cannot fluctuate according to the inclination of either. This question must be governed by the consideration in whom the legal right was vested; for he is the person who has sustained the loss, if any, by the negligence of the carrier, and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured."

§ 702. — **The consignee.**—The legal presumption is that the consignee is the owner of the goods, and for their loss or injury is entitled to damages; but this presumption may be overcome by proof of the real facts as to ownership. The question that determines who is the proper party plaintiff is, then: Who is the owner of the goods, or upon whom is the risk of the shipment; who is the injured party in case of loss or damage to the property? Such an owner or such a party can sustain the action, and if the facts show that that one is not the consignee, then some other one who sustained such like relations to the goods should bring the action. The person who makes the contract to ship the goods may not always be the owner or the party in interest; his relation may be such that he would not suffer loss or damage if the property was destroyed or injured, but if he does occupy such a relation, then he would be properly a party plaintiff. This question was fully treated in a leading case in Massachusetts,<sup>9</sup> where the court discussed the leading cases upon the subject. The court say: "There is no doubt that the party who was owner at the time or becomes owner of the goods afterwards, by assignment of the shipper or otherwise, and who was consignee, indorsee of the bill of lading, or lawful holder of a bill of lading in blank, and who really sustains the damage, may maintain an action against the ship-owner, not be-

<sup>8</sup> 7 Term Rep. 330.

al., 8 Gray (Mass.), 281; Congor

<sup>9</sup> *Blanchard et al. v. Page et v. Railway Co.*, 17 Wis. 477.

cause he has any contract with him for the carriage, but because the ship-owner has the goods lawfully in his possession; it has become his duty to carry them safely and deliver them to the consignee, subject only to a lien for his freight; and, if the consignee is ready to discharge that lien by a payment or tender of that freight, the refusal of the carrier to deliver the goods to such consignee is a breach of duty, and a wrong done him, for which an action, either in tort for the conversion, or in *assumpsit* upon the implied promise to perform such duty, may be maintained." And in *Scammon v. Wells, Fargo & Co.*<sup>10</sup> it was held that "a carrier has the right to assume that the consignee is the owner of goods consigned, and to settle with him therefor, if he has been robbed thereof, in the absence of notice that the consignor was the owner of the property." The court of Pennsylvania<sup>11</sup> held that the rule, that a consignee of goods delivered to a common carrier for transportation might sustain an action for failure to transport or deliver them, would hardly admit of a doubt, and say: "The doubt has rather been whether the action could be maintained in the name of the consignor. And though it has been ruled that it may be when the property in the goods is proved to have remained in the consignor, yet this is not at all in conflict with the right of the consignee to sue when there is no such proof of ownership."

The New York court has held that "the presumption of law is that the consignee is the owner of the goods in the absence of any evidence on the subject, and is the proper party to sue for their injury or loss."<sup>12</sup> And in Illinois, in the case of *Merchants' etc. Co. v. Smith*,<sup>12</sup> it was held that "when goods are consigned without reservation on the part of the consignor, the legal presumption is that the consignee is the owner, and in case of a loss an action against the carrier is properly brought by the consignee." The legal presumption is, and it may be said that this is the conclusion of the authorities generally, that upon the delivery of the goods to a common carrier without any reser-

<sup>10</sup> 84 Cal. 311.

<sup>11</sup> *Arbuckle v. Thompson*, 37 Pa. St. 170.

<sup>12</sup> *Krulder v. Ellison et al.*, 47 N. Y. 36, citing *Sweet v. Barney*, 23 N. J. 235; *Price v. Powell*, 3 Comst. (N. Y.) 322; *Everett v.*

*Saltus*, 15 Wend. 474; Ang. on Car. 497, and cases cited; *Thompson v. Fargo*, 49 N. Y. 188, and see cases cited in brief and opinion.

<sup>13</sup> 76 Ill. 542; *Pa. Co. v. Holderman*, 69 Ind. 18.

vation or notice to the contrary, the title to the goods vests in the consignee, and the carrier has a right to rely upon this presumption. And so it was held that a carrier had a right to settle with the consignee in a case where the property was stolen or destroyed, and that the consignee could sustain an action where property was lost by the carrier.<sup>14</sup>

§ 703. — **One having a special property in the goods.**—The governing principle as to who can sustain the action is based upon an interest in the property. That interest may be ownership, or it may be a special interest. As, for example, an undisclosed agent may sustain the action, or a factor, a broker, a warehouseman, or person who has a special property in the goods, and a recovery by such an one will be a bar to a recovery by the real owner.<sup>15</sup> But the real owner because of this would not be deprived of the right to bring an action for damage or injury to the goods while in the hands of such an agent.<sup>16</sup>

§ 704. — **The consignor.**—Where the goods are delivered to the carrier by the consignor, who has taken therefor a bill of lading or a contract for shipment, an action can be sustained by such consignor by reason of the contract, and it has been held that where there is no express contract he can sustain an action upon the implied contract for shipment. This question was before the court in the case of *Daws v. Peck*<sup>17</sup> and in *Blanchard v. Page*,<sup>18</sup> and so decided. In *Finn v. Railway Co.*<sup>19</sup> it was held that "a consignor who delivered goods to a carrier can maintain an action of contract against him for their loss if there is no relation between the carrier and the consignee other than that which results from the carrier's possession of the goods, and in such action can recover the full value of the property, although it be the property of the consignee, if no action against the carrier has been commenced by the consignee, and will hold the proceeds in trust for the consignee's indemnity." The court in discussing the question say: "The liabilities of a common

<sup>14</sup> *Dyer v. Railway Co.*, 51 Minn. 345, 53 N. W. 714, and see cases cited in opinion of the court.

<sup>15</sup> *Hutch. on Car.*, sec. 721, and see cases cited; *Denver, etc. R. Co. v. Frame*, 6 Colo. 382.

<sup>16</sup> *N. J. etc. Co. v. Bank*, 6 How. (U. S.) 344; *Green v. Clarke*, 12

N. Y. 343. See *Blum v. The Caddo*, Fed. Cas. No. 1573, 1 Woods, 64; *Meigs v. Hayden*, 86 Fed. 926.

<sup>17</sup> 8 T. R. 330.

<sup>18</sup> 8 Gray, 281.

<sup>19</sup> 112 Mass. 524, See authorities cited in the opinion.

carrier of goods are various, and, when not controlled by express contract, they spring from his legal obligations, according to the relations he may sustain to the parties, either as employers, or as owners of the property. *Prima facie* his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. His obligation to carry safely, and deliver to the consignees, subjects him to liabilities for any failure therein, which may be enforced by the consignees or by the real owners of the property, by appropriate actions in their own names, independently of the original contract by which the service was undertaken. Such remedies are not exclusive of the right of the party sending the goods to have his action upon the contract implied from the delivery and receipt of them for carriage. . . . When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon that contract may, if they must not necessarily, be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to receive and transmit the goods, or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise, and the contract of service might be held to be with the purchaser. This distinction, we think, must determine whether the right of action upon the contract of service, implied from the delivery and receipt of goods for carriage, is in the consignor or in the consignee."

The doctrine that the consignor may bring an action founded upon the contract of affreightment has been carried to the extent that such an action may be sustained even though the plaintiff has no interest in the goods,<sup>20</sup> the action resting entirely upon his contract with the carrier, and therefore must be an action of *assumpsit*, and that in such an action he may recover the full damages resulting from loss or injury to the property, but that

<sup>20</sup> Hutch. on Car., sec. 724, and P. 146; Thompson v. Railroad cases cited; American Roofing Co. Co., 11 Tex. App. 145. v. Memphis, etc. Co., 5 Ohio N.

such recovery is in trust and for the benefit of the owner of the goods.<sup>21</sup>

§ 705. — **The defendant.**—It goes without saying that the party defendant must be the carrier who has undertaken the transportation of the goods, either upon an express or implied contract of shipment, and not his servants or agents. If either the servant or agent of a carrier should undertake the transportation of goods, that is without the scope of the business of the carrier, and without any authority from the carrier, it has been held in such case that the agent or servant would be liable.<sup>22</sup> An exception, however, has been recognized in the case of a master of a ship, who it has been held may be regarded as a common carrier, and liable with the owner of the vessel for safe transportation of the property.<sup>23</sup>

#### THE PLEADINGS.

§ 706. **Pleadings follow general rules.**—The pleadings in actions against carriers may be said to follow the general rules upon this subject. As we have seen, the action may be either upon the contract in an action *ex contractu* or for a breach of duty in an action *ex delicto*. If the action is upon the contract the declaration or petition, as the case may be, should set out a contract, alleging the breach and the damages as is usual in such cases. If the action is *ex delicto*, the relation of the parties, the duty of the carrier, his failure to perform that duty, and the resulting damages should be clearly and logically set forth.

§ 707. — **Defenses.**—And so it may be said of the defenses, that there is nothing unusual in the pleadings on the part of the defendant. It is only necessary to know what would constitute a defense, and when and how it can be pleaded. There

<sup>21</sup> Hutch. on Car., sec. 730, and cases cited.

<sup>22</sup> Elkins v. Railway Co., 23 N. H. 275; Citizens' Bank v. Steamboat Co., 2 Story, 17.

<sup>23</sup> Elliott v. Russell & Lewis, 10 Johns, 1 held that "masters and owners of vessels, who undertake to carry goods for hire, are liable as common carriers,

whether the transportation be from port to port within the state, or beyond the sea, at home or abroad; and they are answerable, as well by the marine law as by the common law of England, for all losses, not arising from inevitable accidents, or such as could not be foreseen or prevented."

are matters of special defense which must be set forth specially, for the plaintiff is entitled to notice of such defenses; but all this is regulated by the rules applicable to pleading, and there are no rules peculiar to actions against common carriers.

#### THE PROOFS.

§ 708. **What proofs should be adduced.**—We may say of the rules governing the evidence in such actions as we have said of the pleadings, that there are no rules peculiar to actions against carriers. The material allegations of the petition or declaration must be proved; in other words, the case alleged must be substantiated. Whether the action be *ex contractu* or *ex delicto* it will be necessary to prove a delivery of the goods by the shipper to the carrier, and an undertaking on his part to carry them as alleged in the declaration or petition, a failure to perform such undertaking on his part, and the loss or injury by reason of such failure by way of damages.

§ 709. **Negligence.**—The loss or injury must be shown to be the result of the negligence alleged, and in such cases the owner or shipper is entitled to the benefit of the presumptions of negligence that usually obtain in such cases; as, for example, where it is shown that the goods were delivered for shipment and the carrier undertook to transport them, that they have not been received after a reasonable time and are not accounted for; or if the goods are received in a damaged condition, having been delivered to the carrier in good condition, the presumption is that the loss or injury resulted from the negligence of the carrier.

§ 710. **Defendant's proofs.**—The carrier by way of defense may show that the loss or injury was caused by the act of God or the public enemy, or any of the causes which we have seen will excuse him from liability, and in such case it will be presumed that his negligence or acts did not contribute to the loss, and the burden of showing that the damage was not the result alone of one of the causes which excuse the carrier, but that the carrier's acts contributed to the result, is upon the plaintiff. In other words, the presumption, in the absence of proof, in such cases, is that the carrier performed his duty; that the loss or injury was occasioned by an act of God, or was the result of such causes as excuse his liability if he is not negligent, and the burden of showing that the loss was not alone from such causes,

but that the negligence of the carrier contributed to the loss, is upon the plaintiff. Several of the states have, however, held the rule to be otherwise: that the carrier must not only show that the damage resulted from the act of God, or from some of the causes which excuse him, but must further show that his acts in no way contributed to the loss. This, however, cannot be said to be the weight of authority.<sup>24</sup>

#### DAMAGES.

§ 711. **Of what they generally consist.**—Damages are usually but compensation for the injury or loss to the plaintiff resulting from a breach of the contract of shipment, or from failure to perform a duty which the carrier is legally bound to perform in the matter of the shipment of the goods. They consist of the amount of money that will compensate the plaintiff for his loss, and this amount must be shown by the circumstances in each particular case. As, for example, in a case where the carrier refuses to receive and transport the goods, for loss or injury to the goods while in transit, for failure to properly deliver the goods to the consignee at the place of delivery, for delivery of the goods to the wrong person, for delay in the shipment, and such like obligations as rest upon the carrier. From the mere statement of these obligations it will be seen that the measure of damages is very different in the different classes mentioned.

§ 712. **Actual, exemplary, punitive or vindictive damages.**—Damages are usually said to be either actual, exemplary, punitive or vindictive, but there is some diversity in the opinions of the courts upon the question of the kind of damages that may be recovered against carriers. Some very strong reasons are advanced by a large number of the supreme courts of the states and of the United States, urging that exemplary, punitive, and even vindictive damages may be recovered in cases where the proof shows a wanton or malicious invasion of the plaintiff's rights, or where there has been oppression or vindictiveness on the part of the defendant, while others of the courts hold that only actual or compensatory damages can be recovered, yielding, however, this much: that in case of wantonness or maliciousness, or oppressive and vindictive action on the part of the defendant

<sup>24</sup> See Hutch. on Car., secs. 665, 667, and notes.

carrier, the compensation should be liberal and sufficient to cover the actual injury because of such wantonness, maliciousness or vindictiveness. The supreme court of Kentucky have held that juries might give what is denominated "smart money" in certain aggravated cases of tort. The court say: "If trespassers were bound to pay in damages no more than the exact value of the property forcibly taken and converted by them, there would be no motive created by the operation of law to induce them to desist and abstain from invading the rights of others. To furnish such a motive 'smart money' is allowed."<sup>26</sup> The Illinois court has held to this doctrine in cases where the acts are not indictable, and "where the trespass is wanton, wilful or malicious, or accompanied with such acts of indignity as show reckless regard of the rights of others," basing their opinion upon the ground of punishment for the wrong and to deter others.<sup>26</sup> Mr. Justice Grier, for the supreme court of the United States, in *Day v. Woodworth*,<sup>27</sup> said: "It is a well established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages inflicted by way of penalty or punishment given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been en-

<sup>26</sup> *Tyson v. Ewing*, 3 J. J. Marsh. (Ky.) 186.

<sup>26</sup> *Cutler v. Smith*, 57 Ill. 252.

<sup>27</sup> 13 How. 363-371.



titled to recover had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."

Mr. Justice Davis, in *Milwaukee v. Arms*,<sup>28</sup> discussing this question, used this language: "It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a general rule, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be assessed. As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea that compensation alone is the true measure of redress. But jurists have chosen to place this doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; and, although some text-writers and courts have questioned its soundness, it has been accepted as the general rule in England and in most of the states of this country. . . . In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages."

While this doctrine seems to be held with more or less emphasis in very many states of the Union, some of the courts have, however, as we have said, modified the ruling by holding that a

<sup>28</sup> 91 U. S. (1 Otto), 489-493; *Philadelphia, etc. Ry. Co. v. Quigley*, 21 How. 213.

very liberal allowance of compensatory damages may be allowed to the injured plaintiff.

§ 713. **Exemplary damages confined to liberal compensatory or actual damages.**—Among the authorities who hold to the doctrine that a liberal allowance of compensatory damages to the injured plaintiff should be allowed in cases where exemplary damages would appear to be proper, is to be found Professor Greenleaf, who urges this to be the correct doctrine. He says:<sup>29</sup> “It is frequently said that in actions *ex delicto* evidence is admissible in aggravation or in mitigation of damages. But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the injury itself. The circumstances, thus proved, ought to be those which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive.” One of the best considered cases upon the subject of damages is that of *Fay v. Parker*.<sup>30</sup> In that case Mr. Justice Foster has considered every leading American and English case upon the subject up to the time of the decision. His argument is exhaustive and his reasoning very strong. In the course of the opinion he says: “I venture to say that no case will be found in ancient, nor indeed in modern, reports in which a judge explicitly told a jury that they might, in an action for an assault and battery, give the plaintiff four damages, viz.: 1. For loss of property, as for injury to his apparel, loss of labor and time, expenses of surgical assistance, nursing, etc.; 2. For bodily pain; 3. For mental suffering; and 4. For punishment of the defendant’s crime. But a critical examination of the cases will show, as I believe, that this fourth item is, in fact, comprehended in the third, but has grown into and become a separate and additional item by inconsiderate, if not intemperate and angry, instructions given to juries when the court was too much incensed by the exhibition of wanton malice, revenge, insult and oppression to weigh with coolness and deliberation the meaning of language previously used by other judges; instructions prompted by impulses of righteous indignation, swift to administer supposed justice to a

<sup>29</sup> 2 Greenl., sec. 266; and see cases cited.

<sup>30</sup> 53 N. H. 342; 1 Sutherland, Damages, 730.

guilty defendant, but expressed with too little caution and without pausing to reflect that the court was thus encouraging the jury to give the plaintiff more than he was entitled to,—to give him, in fact, as damages the avails of a fine imposed for the vindication of the criminal law, and for the sake of public example.”

Chief Justice Cushing, in *Bixby v. Dunlap*,<sup>31</sup> quotes with approval the case of *Fay v. Parker*. The supreme court of Michigan, while they have recognized exemplary damages and allowed such damages to be recoverable in the redress of private injuries, have taken occasion to say in *Watson v. Watson*<sup>32</sup> that the increased damages resulting from circumstances of aggravation are sometimes spoken of as exemplary, as in a certain sense they are, but in a less misleading and more accurate sense they are compensatory. And this judgment has been followed in several cases decided in that court. As in *Scripps v. Riley*<sup>33</sup> it was held that actual damages for injured feelings may be increased or aggravated by the defendant's vindictive feelings, or the degree of malice, recklessness, gross negligence, or carelessness on his part. But in *Long v. Printing Co.*<sup>34</sup> the court say: “Damages for injury to feelings, shame, mortification, mental anxiety, insulted honor and indignation have always, in this state at least, been regarded as actual damages and not as exemplary, punitive, or vindictive damages.” In an action against carriers for the conversion of a quantity of flowers intrusted to them for delivery to plaintiff's customers in New York, which they appropriated to their own use, sending them to their own customers and to supply their own contracts, knowing that they had no right to do so, the court held that it was not error to charge the jury that “if they can say from the evidence that the defendants dishonestly overrode the rights of the plaintiff for their own purposes, knowing that the goods in question were his and not theirs, and disregarding his rights took the goods for their own use, punitive damages may be awarded.”<sup>35</sup>

<sup>31</sup> 56 N. H. 456.

<sup>32</sup> 53 Mich. 168.

<sup>33</sup> 38 Mich. 10; *Welch v. Ware*, 32 Mich. 72; *Dalman v. Konning*, 54 Mich. 320. Held, in *Durfee v. Newkirk*, 83 Mich. 522, that exemplary damages cannot be allowed where the damages are

capable of accurate pecuniary estimation. *Ten Hopen v. Walker*, 96 Mich. 236.

<sup>34</sup> 107 Mich. 207; *Ford v. Cheever*, 105 Mich. 679.

<sup>35</sup> *Downing v. Outerbridge*, 25 C. C. A. 244, 79 Fed. 931.

It appears, however, that the disagreement of authorities is more as to the name of the damages that all agree may be allowed. None of the courts or authors will claim but that under certain circumstances proved in a case, exemplary damages may be properly recovered, though some of them would insist that the exemplary damages are allowed and recoverable only as actual damages, or, as they are sometimes called, compensatory damages.

Mr. Justice Foster, in *Fay v. Parker*,<sup>50</sup> already cited, in the course of his opinion says: "Call them what you may, compensatory in fact or punitive in their operation, if the same damages are awarded but once the distinction is merely verbal, and we may well doubt whether the learned chief justice, in recommending the award of damages with a liberal hand, intended anything more or other than we mean when we tell juries to give the plaintiff what the defendant ought to pay and the plaintiff ought to receive in view of the wrong and suffering inflicted by the malice, insult and indignity exhibited by the circumstances of the case."

The supreme court of Michigan, in *Ross v. Leggett*,<sup>51</sup> say: "It is of little consequence by what name the damages given are called, provided the case is one involving that class of injuries for which the plaintiff is entitled to recover; they may be called "exemplary," "punitive," "vindictive," "compensatory," or added damages. The important question always is in every case, Was the character of the wrong suffered or injury sustained such as may be lawfully atoned for or compensated in money?"

§ 714. — **Liability of principal or master for acts of agents or servants.**—It is well understood that carrier corporations, like other corporations, act entirely through their servants or agents. The liability of such a carrier, as well as all who transact business by agents or servants, for damages must depend upon the authority of the agent or servant who caused the injury. It should appear that they were acting within the scope of their authority, express or implied, at the time they were guilty of the breach of duty. In determining whether this relation existed it is necessary to show that the agent or servant was engaged in carrying out the object of his employment; that

<sup>50</sup> 53 N. H. 342.

<sup>51</sup> 61 Mich. 445-452.

he was working or acting, or operating within the scope of his authority, not that he was authorized to commit the specific tort, but that the act complained of was incident to the performance of the duty that his master or principal had employed him to perform; that while in the service of the master or principal, and while acting for him, and in the course of his employment, the tort complained of was committed. The true rule would seem to be that the master is only responsible so long as the servant can be said to be doing the act he was employed to do, and while in the course of his employment as servant he was guilty of the negligence complained of.<sup>38</sup> In *Downey v. Railway Co.*<sup>39</sup> the court say: "Where the wrong has been done under circumstances indicating wantonness, violence and oppression upon the part of the wrong-doer, exemplary damages are recoverable. But such damages are not recoverable against a railroad company unless the injury is the result of the authorized or ratified misconduct of its servants. There are some cases which hold that when a person is injured by gross negligence on the part of the railway company he may recover exemplary damages; but the better and more reasonable doctrine seems to be that the railway company is not to be held liable in exemplary damages for injuries caused by the negligence of its servants, unless it be shown that the servant's act was wilful, and was either authorized or ratified by the company; but such authorization or ratification can be evidenced either by an express order to do the act, or an express approval of its commission, or by an antecedent retention of a servant of known incompetency, or by a subsequent retention or promotion of the negligent servant."

§ 715. **Damages for refusal to receive and transport.**—The action for refusal to receive the goods and transport them cannot depend upon a contract, for none exists; it is based entirely upon the duty of the carrier to receive and carry the property offered. As we have seen there may be a good and legal reason for such refusal on the part of the carrier, as, for example, that the goods were not fit for shipment. But if there is no valid

<sup>38</sup> *Quarman v. Burnett*, 6 M. & W. 599; *Joslin v. Grand Rapids, etc. R. Co.*, 50 Mich. 516; *Sleath v. Wilson*, 9 C. & P. 607; *Mech. on Agency*, sec. 737.

<sup>39</sup> 28 W. Va. 732, 743; *Ricketts v.*

*Railway Co.*, 33 W. Va. 433; *Talbott v. Railway Co.*, 42 W. Va. 560; *Patterson on Railway Accident Law*, secs. 392, 471; *Cleg-horn v. N. Y. etc. R. Co.*, 56 N. Y.

44.

legal reason for the refusal, then the measure of damages, in case the goods are articles of merchandise and shipped for the market, has been held to be such an amount as would place the plaintiff in the position he would occupy had the goods been received, carried and delivered at their destination; that is to say, the difference in the value of the goods at the time they would have to be delivered, if transported, at the place of destination, and their value at the place of proposed shipment, with interest from the time they should have arrived, less the cost of transportation.<sup>40</sup> It must be remembered, however, that it is the duty of the injured party not to magnify or increase the damages, but rather to make them as small as he reasonably can under the circumstances.<sup>41</sup> And so in this case it would be the shipper's duty to ship the goods if he could do so by some other route; and in such case the measure of damages would be the amount of expense he was compelled to pay in carrying the goods and delivering them to the other carrier, the excess freight, if any, he was obliged to pay, and, if delayed because of the refusal, whatever loss was incurred on that account. But if the price demanded by the other carrier was reasonable, but would have rendered the shipment unprofitable, the shipper would not be justified in procuring such shipment, for in such case he could procure like goods in the terminal market for a less amount, and therefore there would be no damage.

§ 716. *For loss or injury in transit.*—If the goods are lost or injured in transit, we have but to apply the principle discussed in the last section. The damages would be as there stated: such an amount as would place the principal in the position he would occupy had the goods been delivered at the place of their destination; and where the carrier received goods for transportation and failed to deliver them, it was held that the owner was entitled to the market value of the goods at the time and place

<sup>40</sup> *Ward v. Elkins*, 34 Mich. 439, and see cases cited in briefs of counsel; *Harvey v. Railway Co.*, 124 Mass. 421; *Galena, etc. R. Co. v. Rae*, 18 Ill. 488; *Cobb v. Railway Co.*, 38 Iowa, 601.

<sup>41</sup> *Houston, etc., Co. v. Smith*, 63 Tex. 322, 22 Am. & Eng. Cases, 421; *Pittsburg, etc. Co. v. Morton et al.*, 61 Ind. 539. When the

goods are perishable, the shipper must not remain inactive but must adopt whatever means are at hand to forward the goods at once; nor can he send the goods in different parcels and claim damages for the additional freight charges. *Ward, etc. Co. v. Elkins, supra*; *Grund v. Pendergast*, 58 Barb. 216.

they should have been delivered,<sup>42</sup> with interest from that time. In *Cutting v. Railway Co.*<sup>43</sup> the supreme court of Massachusetts say: "As a general rule the appropriate compensation for the breach of a contract to deliver goods is their market value in money at the time and place at which they should have been delivered, with interest thereon, and it is admitted that such is the rule in an action against a carrier if the goods are never delivered."

The measure of damages, however, for goods delivered in a damaged condition is held to be the difference between the value of the goods in their damaged state and their value at the place of destination had they been delivered in good order.<sup>44</sup> But where a machine was so damaged by the carrier's negligence that the cost of repairing it would equal the cost of a new one, it was held that the plaintiff could recover the value of the machine, the freight paid and interest from the time when it should have been delivered.<sup>45</sup>

§ 717. **Shipper bound by value placed upon his goods when shipped.**—But where a shipper places a value upon his goods and knowingly enters into a contract for their shipment at a price based upon such valuation, he is bound by the contract. Such a contract does not excuse the carrier from the exercise of reasonable care, but the shipper cannot have his property transported at a low rate because of such valuation, and in case of loss compel the carrier to pay more than the value stated in the contract.<sup>46</sup>

§ 718. **Where the goods are not merchandise and not marketable.**—Goods that have no market value, but are especially useful and valuable to the shipper, are often shipped and lost or damaged in transit. The damage in such case cannot be governed by the market value of the goods, because they have no such value, but the recoverable damages must depend upon the value of the goods to the owner; but in fixing the value the

<sup>42</sup> *Spring v. Haskell*, 4 Allen, 112.

<sup>43</sup> 13 Allen (Mass.), 381.

<sup>44</sup> *Silverman v. Railway Co.*, 51 La. Ann. 1785, 26 So. 447; *Hell v. Railway Co.*, 16 Mo. App. 363; *Railway Co. v. Berchfield*, 12 Tex. Civ. App. 145.

<sup>45</sup> *Thomas, etc. Co. v. Railway Co.*, 62 Wis. 642.

<sup>46</sup> *Chicago, etc. R. Co. v. Miller*, 79 Ill. App. 472; *Hart v. Railway Co.* 112 U. S. 331, 18 Am. & Eng. Ry. Cases, 604; *Railway Co. v. Miller*, 16 Neb. 661, 18 Am. & Eng. R. Cases, 545.

owner will not be permitted to base his estimate upon a partial or capricious price, but an amount must be fixed that under all the circumstances would be considered reasonable and just.<sup>47</sup>

Where goods were damaged in transit which had no market value, it was held that the measure of damages would be the cost of reproducing or replacing them, and if they could not be reproduced or replaced, then the value of the property to the owner.<sup>48</sup> Where the property shipped was a family portrait, it was held by the Massachusetts court that the damages for its loss would be the value to the owner and not the market value. The court say: "The general rule of damages in trover, and in contract for not delivering goods, undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property. To instruct the jury that the measure of damages for the conversion or loss of a family portrait is its market value would be merely delusive. It cannot with any propriety be said to have any market value. The just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner."<sup>49</sup> Where the property shipped consisted of stereotyped plates to be used by the plaintiffs in their special business and had no market value, it was said by the Massachusetts court, "such things cannot, with any propriety, be said to have a market value, and the actual value to him who owns and uses them is the just rule of damages in an action against him who converts them to his own use."<sup>50</sup>

§ 719. — Goods shipped to be delivered on contract of sale.—In considering this question, the general rule governing damages must be kept in mind. It will be remembered that as a general rule the damages in all cases must be proximate and the natural consequences of the breach of duty or contract alleged,<sup>51</sup> the maxim being "*causa proxima non remota spectat*—

<sup>47</sup> Denver, etc. R. Co. v. Frame, 6 Colo. 382, 18 Am. & Eng. R. Cases, 637.

<sup>48</sup> Houston, etc. R. Co. v. Ney, 58 S. W. 43.

<sup>49</sup> Green v. Railway Co., 128 Mass. 221, 35 Am. Rep. 370.

<sup>50</sup> Stickney et al. v. Allen, 10 Gray (Mass.), 352.

<sup>51</sup> Hadley v. Baxendale, 9 Exch. 341; Galt v. Archer, 7 Grat. (Va.) 307; Cobb v. Railway Co., 38 Iowa; 601; Medbury v. Railway Co., 26 Barb. (N. Y.) 569; Railway Co. v. Cobb, 64 Ill. 143.



*tur;*" but in the class of cases under consideration the courts have generally held that where goods have been transported by the carrier to fill a contract of sale between the owner and the consignee, the carrier having notice of that fact at the time of receiving the goods and entering upon the shipment of them, the goods being lost under circumstances rendering the carrier liable, and by reason of the loss and consequent delay the owner is rendered unable to fulfill his contract, the measure of damages in an action against the carrier is governed by the loss to the owner by reason of the failure to deliver the goods upon his contract of sale, or the contract price of the goods.

§ 720. — **Failure to deliver at time specified or within reasonable time—Reasonable delay.**—As we have seen, it is the duty of the carrier to transport and deliver the goods shipped to the consignee within the time stipulated, and if there is no stipulation as to the time of delivery, then within a reasonable time; if the goods shipped are intended for the market, for a breach of the contract of shipment, or a breach of duty upon the part of the carrier, the rule of damages would be the difference between the value of the goods at the time and place they should have been delivered and their value when they are in fact delivered, computed at the place of destination, with interest, less freight unpaid.<sup>52</sup> In *Cutting v. Railway Co.*<sup>53</sup> Mr. Justice Gray in rendering the opinion, said: "The true rule and measure of damages, in our opinion, whenever by reason of inexcusable delay of the carrier the goods are not delivered until after they have diminished in market value, is the amount of the diminution. This allows to the person injured the value, as exactly as it can be estimated in money, of that of which he has been finally deprived by the wrongful act of the defendant; and is the most simple and just rule as well as the easiest to be applied; for it depends on the general market value of the goods, and involves no contingent or speculative profits, and no consideration of any

<sup>52</sup> *Railway Co. v. Mudford*, 48 Ark. 502; *Peet v. Railway Co.*, 22 Wis. 594, 91 Am. Dec. 446; *Devereux v. Buckley*, 34 Ohio St. 16, 32 Am. Rep. 342; *Sisson v. Cleveland, etc. Co.*, 14 Mich. 489; *In re Peterson v. Case* (C. C.), 21 Fed. 885; *Railway Co. v. Johnson*,

85 Ga. 497; *Railway Co. v. Lockhart*, 71 Ill. 627.

<sup>53</sup> 95 Mass. (13 Allen), 381; *Fox v. Harding*, 7 Cush. 516; *Waite v. Gilbert*, 10 Cush. 177; *Le Peintur v. Southeastern Ry. Co.*, 2 Law Times (N. S.), 170; *Gee v. Lancashire & Y. Ry. Co.*, 6 H. & N. 211, 9 C. B. (N. S.) 646.

other contracts made or omitted to be made by the plaintiff in view of his contract with the defendant. To refer to such other contracts, or the profits which might have resulted from them, not within the knowledge or contemplation of the defendant, would be to hold him liable for the consequences, or allow him the benefit, not of his own contract with the plaintiff, but of dealing between the latter and third persons with which the defendant had nothing to do. . . . The distinction between loss of profits and diminution in the market value of the goods was well stated in the first of these cases by Mr. Justice Byles, who said: 'Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods; whereas diminution in exchangeable value is only something subtracted from the inherent value of the articles themselves.' 'It is admitted that deterioration in quality is to be taken into account in estimating the damage the plaintiff has sustained; it is admitted also that loss or diminution in the quantity is to be taken into account; and I do not see why a loss in the exchangeable value of the goods should not also be taken into account.' "

If the goods are not intended for the market, as, for example. household goods or articles that are shipped for the special use of the consignee, the damages would be measured by the value of the use of the goods during the delay, with interest from the time they should have been delivered.<sup>54</sup>

§ 721. **Failure to deliver and misdelivery.**—If the carrier after a reasonable time fails to deliver the goods to the consignee, he will be liable for their value at the place of destination, with the freight paid and interest from the time the goods should have been delivered, if they were intended for the market, or were marketable goods; and the same rule will generally obtain in cases of misdelivery. Cases are often peculiar in their facts, and it would be impossible to lay down a rule of damages that would govern every case. As for example, where goods

<sup>54</sup> *Brown v. Adams*, 3 Tex. App. Civ. Cases, sec. 390; *Marsh v. Railway Co.*, 6 Am. & Eng. Ry. Cases, 359; *Railway Co. v. Frame*, 6 Colo. 382; *International, etc. Co. v. Nicholson*, 61 Tex. 550. And see *Vicksburg, etc. Co. v.*

*Ragsdale*, 46 Miss. 458, where the rule of damages in case of delay in transporting articles intended to be used in business, thereby causing loss of profits and use, is discussed.

were misdelivered and the consignee received the goods immediately from the party to whom they were wrongfully delivered, it was held that, while the plaintiff could recover, his recovery could only be for nominal damages.<sup>55</sup>

## II.

### ACTIONS AGAINST CARRIERS OF PASSENGERS.

§ 722. **Survival of actions for personal injuries.**—At the common law actions for personal injuries died with the person injured, the maxim being “*actio personalis moritur cum persona*.” This rule of law has been modified by statutes in England and in the several states of the United States, so that at the present time the personal representatives of the deceased may bring an action for the injury and death in all cases where, if death had not resulted, the injured person could have sustained an action for the injury; the action being for the benefit of the near relatives of the deceased, as the wife, if living, or the children or parents, or those dependent upon the deceased; and these statutes apply to all cases resulting from injury whether by common carriers or other persons.<sup>56</sup>

§ 723. **When the injury does not result in death.**—Where death does not result from the injury, the action can be sustained by any person damaged by reason of the injury resulting from the negligence of the defendant; that is to say, the injured person himself, if capable of bringing an action, may recover against the carrier; or a parent for an injury to his minor child, or a husband for an injury to his wife, which deprives him of her society and services.

<sup>55</sup> *Rosenfield v. Express Co.*, 1 Wood (U. S.) 131.

<sup>56</sup> By 4 Edw. III., ch. 7, the rule was modified so as to give an action in favor of a personal representative for injuries to personalty; by 3 and 4 Will. IV., ch. 42, against personal representatives for injuries to personalty or realty, and by 9 and 10 Vict., ch. 23, an act known as Lord Campbell's Act was passed, allowing

actions for damages for the death of the person injured. 3 Blk. Com. 302; *Russell v. Sunbury*, 37 Ohio St. 374; *Mitchel v. Hotchkiss*, 48 Conn. 16; *James v. Emmet Co.*, 55 Mich. 335; *Racho v. Detroit*, 90 Mich. 92; *Davis v. New York, etc. R. Co.*, 143 Mass. 305; *Carey v. Railway Co.*, 1 Cush. 475; *Lyon v. Woodward*, 49 Me. 69.

## THE PLEADINGS.

§ 724. **Based upon what.**—Actions against common carriers of passengers, like actions against carriers of goods, are based upon the contract for carriage, express or implied, or upon a breach of that duty which the carrier owes to the public and to the individual passenger to furnish safe transportation within a reasonable time and in a reasonably comfortable manner.

The duty of the carrier to the passenger and the duty of the passenger to the carrier have already been discussed in a former chapter. A failure to perform that duty, if there is no legal limitation, fixes the liability, and the declaration or petition in an action against the carrier should in a concise and logical manner allege in apt and sufficient language the existence of the relation of carrier and passenger, and by averment apprise the court and the parties of the particular duty that the carrier has failed to perform; or if upon a contract, the particular breach of the contract which the injury complained of has resulted in; that the plaintiff was in the exercise of ordinary care; that the failure on the part of the defendant to perform the contract or duty resulted in the injury complained of and alleging the resultant damages. The usual and existing rules applicable to pleading are followed in setting out in proper language in the declaration or petition the averment above mentioned. The plaintiff must by his declaration make out a case against the defendant, otherwise it would be subject to demurrer.

§ 725. **The answer or plea of the defendant.**—The defendant may in his plea or answer set out any of the defenses which have already been mentioned by which he is able to meet the case made by the plaintiff; that is to say, a general denial of the allegations of the petition or declaration; or that the plaintiff's injury was not the proximate result of the accident complained of, or that the plaintiff was guilty of contributory negligence.

## THE EVIDENCE.

§ 726. **What must be proven.**—It is incumbent upon the plaintiff to make out his case as alleged by a preponderance of evidence. The allegations made in the declaration or petition must be proven so clearly that it may be said that the case is proved. While this is true, it does not follow that the plaintiff must prove by oral or written proof every fact in the case nec-

essary to be proved in order to sustain the allegations in his petition or declaration, for there are certain facts which are presumed; as, for example, it appearing that the defendant is a common carrier of passengers; that the plaintiff was a passenger for hire and being transported by him upon his vehicle, the law lays upon the carrier in such case certain duties and raises certain implied obligations, and it is not necessary to prove what these duties or obligations are; but when the circumstances and facts are shown which prove the relation of passenger and carrier and circumstances of the accident, and that the injury resulted from the accident which was the result of the negligence of the carrier, and the amount of damages which were directly caused by the accident, the case is made out.

§ 727. **Presumption of negligence.**—Negligence, however, is not always presumed from the mere fact that an accident occurred which resulted in an injury to the passenger, for although a very high degree of diligence is required of the carrier, he is, as we have seen, often excused from liability; as where the accident was directly and entirely attributable to an act of God or the public enemy, or was the result of the negligence of the plaintiff; in such cases negligence would not be presumed, but could only be made out by proof; and as to whether the negligence which caused the accident and which resulted in damages was attributable to the carrier would be a question for the jury; but if the accident resulted from a collision of trains, from a defective track, from broken and unsuitable vehicles or machinery, in such like cases negligence would be presumed, for in all such cases the defendant has the exclusive control and management and must therefore avoid the accident; as, for example, he is bound to so regulate the running of his trains that collisions will not occur. The track over which trains are run, the vehicles which are used for conveying the passengers, the machinery which is employed by the carrier for the hauling of his trains, all are under the immediate and absolute control of the carrier, and so if he fails to perform his duty in respect to these agencies, negligence will be presumed and he will be liable for damages resulting therefrom. And where a stage-coach was overturned by the coming off of a wheel upon a smooth and level road, the evidence was held to be competent to show that the coach could not have been properly prepared for the road.<sup>57</sup> And where a

<sup>57</sup> Ware v. Gay, 11 Pick. (Mass.) 106.

railroad train ran from the track and was overturned, it was fairly presumable, as the machinery and railway track were exclusively in the management of the railway company, that the accident arose from its want of care; no explanation of the cause being offered.<sup>58</sup> In *Kendall v. Boston*,<sup>59</sup> in summing up the cases cited, the court say: "In all these cases it is to be observed that the defendant has been proved to have had the exclusive control and management of those objects or agencies from some defect in which the accident must have taken place."

In *Edgerton v. Railway Co.*<sup>60</sup> it is said: "Whenever a car or train leaves the track it proves that either the track or machinery, or some other portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in the proper condition, and to operate it with the necessary prudence and care, has in some respect violated this duty. It is true that a bad state of the track or machinery may have resulted from the wrongful act of persons for whose conduct the defendant is not responsible and the injury to the passenger may have resulted therefrom, and in such case the company is not responsible; but such cases are extraordinary, and those guilty of perpetrating such acts are highly criminal; and therefore there is no presumption of the perpetration of such acts by others, and the company, if excusable upon this ground, must prove the facts establishing such excuse." And where a passenger in defendant's stage-coach was drowned by the coach being precipitated into the water because of the uncoupling of the fore-wheels while it was being driven into a ferry-boat, it was held that the negligence of the defendant would be presumed.<sup>61</sup>

<sup>58</sup> *Carpue v. London, etc. R. Co.*, 5 Q. B. 747; *Fetial v. Railway Co.*, 109 Mass. 390, 405.

<sup>59</sup> 118 Mass. 234, 236.

<sup>60</sup> 39 N. Y. 227, 229.

<sup>61</sup> *McLean v. Burbank*, 11 Minn. 277; *Stokes v. Saltonstall*, 38 U. S. (13 Pet.) 181, 10 L. ed. 115; *Lawrence v. Green*, 70 Cal. 417, 59 Am. Rep. 438; *Anderson v. Scholey*, 114 Ind. 553; *Farish v. Reigle*, 11 Grat. (Va.) 697; *Balti-*

*more, etc. Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578; *Wilson v. Railway Co.*, 26 Minn. 278; *Meier v. Railway Co.*, 64 Pa. St. 230; *Railway Co. v. Williams*, 74 Ind. 462; *Cleveland, etc. R. Co. v. Newell*, 104 Ind. 364; *Mitchell v. Railway Co.*, 87 Cal. 62, 11 L. R. A. 130; *Peoria, etc. R. Co. v. Reynolds*, 88 Ill. 418; *Louisville, etc. Co. v. Jones*, 108 Ind. 551. And see *Barnowski v. Helson*, 89

The court of Minnesota lays down the following rule: "Where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of plaintiff's own case." And the court further say: "The severe rule which enjoins upon the carrier such extraordinary care and diligence is intended, for reasons of public policy, to secure the safe carriage of passengers in so far as human skill and foresight can effect such result."<sup>52</sup>

§ 728. **Contributory negligence.**—Among the most frequent defenses to actions for personal injuries against carriers of passengers is that of contributory negligence on the part of the plaintiff. The plaintiff, as we have seen, must be free from negligence upon his part, else he cannot recover. As to the necessity of the plaintiff alleging in the declaration or petition that he was exercising due diligence, or, in other words, was free from negligence which contributed to the injury, the authorities do not entirely agree. While it is usual to so allege, or at least to allege facts from which the conclusion is inferable, it would seem that the weight of authority is that it is not necessary for the plaintiff to aver that he was free from such negligence, the rule being that it is not necessary to anticipate the answer of the adversary, which, as Hale, C. J., has said, is "like leaping before one comes to the stile." This seems to be the rule in England and in the following states in the Union: Alabama, California, Georgia,

Mich. 523, 15 L. R. A. 33, also cases cited in note, 15 L. R. A. 35, 36, 37. In *Pershing v. Railway Co.*, 71 Iowa, 561, held "where a passenger is injured by an accident to a train, the presumption of negligence arises only as to those acts or omissions which might have caused the accident." *N. J. etc. Co. v. Pollard*, 89 U. S. (22 Wall.) 341, 22 L. ed. 877. In *Railway Co. v. Walrath*, 38 Ohio St. 461, it was held that "on proof of injuries sustained by a

passenger on a railroad train by the falling of a berth in a sleeping-car, and that the passenger was without fault, a presumption arises, in the absence of other proof, that the railroad company is liable." (Citing cases.)

<sup>52</sup> *Smith v. Railway Co.*, 32 Minn. 1, 50 Am. Rep. 550; and see for a general discussion, citations of authorities and extended brief of counsel. *Spellman v. Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316.

Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Texas, Virginia, Washington, West Virginia, Wisconsin, and New York.

On the other hand, there are a number of states which hold that the plaintiff must aver that he was free from contributory negligence, or, at least, that the injury occurred without fault upon his part: Indiana, Maryland, Maine, Massachusetts, Michigan, Rhode Island, Illinois and Iowa.

It being necessary to make out a *prima facie* case to prove the allegations of the declaration or petition, it therefore follows that in the states where it is incumbent upon the plaintiff to allege that he is free from negligence or fault which contributed to the injury, the burden of proof would be upon him to so prove upon the trial, and in those cases where it is not necessary so to allege, that the burden of proof would be upon the defendant to show that the plaintiff was guilty of contributory negligence; in other words, that the necessary allegation would govern as to the burden of proof.<sup>63</sup>

#### DAMAGES.

§ 729. **General rules applicable.**—The general rules applicable to damages which have already been discussed as applicable to common carriers of goods are applicable here. Compensation for the personal injury of the plaintiff is sought either in compensatory, exemplary, vindictive or punitive damages. The rule always applicable to every case where damages are sought, and which must never be lost sight of, is that the damages recoverable must be the proximate and natural consequences of the injury. "You must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of."<sup>64</sup>

§ 730. **Proximate or remote consequences.**—"Where the evidence and findings show that defendant, while running its trains

<sup>63</sup> Cases have been collected and cited and largely quoted in § Ency. of Pl. & Pr. 1, etc., and in

Hutch. on Car., secs. 302, 303, and notes.

<sup>64</sup> Hobbs v. Railway Co., L. R. 10 Q. B. (1872), 111.



and locomotives over a street opposite plaintiff's salt vats, unlawfully cast over and on plaintiff's land and salt vats great quantities of dirt, dust and cinders, whereby the amount of salt produced by plaintiff was lessened in quantity, deteriorated in quality and diminished in value, the damages are not too remote or speculative to justify a recovery." <sup>65</sup> In an action for personal injuries it was held sufficient if the damages claimed legitimately flowed from the negligent act of defendant, and whether such damages might have been foreseen by the defendant is immaterial. <sup>66</sup> In a case where a florist brought an action for damages against a gas company by reason of gas escaping and damaging his plants, undertaking also to recover for injury to his business reputation on account of the failure of the plants sold to customers to grow as recommended, the court of New Hampshire held that the full damage to the plants was a proper matter of inquiry, but that a claim for the injury of the plaintiff's reputation on account of the sales of damaged plants was conjectural and too remote to be allowed. The court say: "The special damages claimed and allowed for the injury to the plaintiff's business reputation on account of his sales of damaged plants were not properly recoverable and must be disallowed as too remote. There are cases undoubtedly where the tort complained of is of such a nature that the law will not nicely attempt to limit the amount of reparation, but will extend the line of relief so as to embrace all the consequences of the wrong-doer's conduct although quite remote from the original transaction. But as a general rule it may be said that in cases of tort without special aggravation, where the conduct of the defendant cannot be considered so morally wrong or grossly negligent as to give a right to exemplary or vindictive damages, the extent of the plaintiff's remuneration is restricted to such damages as are the legal and natural consequences of the defendant's wrongful act." <sup>67</sup> And so expenses incurred by reason of the injury are held to be recoverable; as, for example, expenses necessarily incurred by the plaintiff while disabled in procuring competent help in his business, or to do the work which would have been performed by himself had he not been injured; also services of a

<sup>65</sup> *Syracuse, etc. Co. v. Railway Co.*, 60 N. Y. Supp. 40.

<sup>67</sup> *Dowe v. Winnepesaukee*, 69 N. H. 312, 42 L. R. A. 569.

<sup>66</sup> *Crouse v. Railway Co.*, 104 Wis. 473, 80 N. W. 752.

physician who is called to render medical aid; also amounts necessarily paid for medicines, and the value of the services rendered by the wife of the injured person, have been held to be recoverable by the husband in an action for the injury.<sup>68</sup> Loss of ability to labor is an element of damage which may be considered; also the loss of earnings and earning capacity, the rule being "that the jury may award such fair sum as would in their judgment compensate for the lessened or destroyed ability to earn money, making due allowance for the contingencies and uncertainties that inhere in such matters."<sup>69</sup> But speculative profits—profits on invested capital—are not recoverable as damages resulting from one's inability by reason of injuries to transact his ordinary business; such damages would be considered too remote. The loss of profits as damages for a breach of a contract is governed by the same rules that apply to the recovery of other damages; that is to say, it must be the direct, immediate result of the injury. Wherever there is any speculation or uncertainty, such profits are not recoverable.<sup>70</sup>

So damages for mental suffering, as from fright, remorse and bodily pain, are recoverable when it can be shown that they are the direct result of the injury. Mental and physical suffering are classed as actual damages when they are a natural and direct result of the accident.<sup>71</sup> And it has been held that disfigurement caused by a tortious injury is an element of general damage,

<sup>68</sup> *Crouse v. Railway Co.*, 104 Wis. 473, 78 N. W. 446; *Omaha Street Ry. Co. v. Emminger*, 57 Neb. 240, 77 N. W. 675; *North Chicago, etc. Co. v. Zeiger*, 78 Ill. App. 463; *Willis v. Traction Co.*, 189 Pa. St. 430, 42 Atl. 1; *Williams v. City, etc.*, 119 Mich. 395; *Wynne v. Railway Co.*, 156 N. Y. 702, 51 N. E. 1094.

<sup>69</sup> *Denver v. Sherrett*, 31 C. C. A. 499, 88 Fed. 226; *Chicago, etc. Co. v. Postin*, 59 Kan. 449; *Levinski v. Banking Co.*, 34 C. C. A. 452, 92 Fed. 449; *Mirandona v. Burg*, 51 La. Ann. 1190; *Raynor v. Brewing Co.*, 100 Wis. 414; *Conway v. Mitchell*, 97 Wis. 290.

<sup>70</sup> *Cent. Trust Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 293.

<sup>71</sup> *Omaha St. Ry. Co. v. Emminger*, 57 Neb. 240, 77 N. W. 675. In *O'Flaherty v. Railway Co.*, 54 N. Y. Supp. 96, it was held that "injuries from fright accompanying a physical injury furnishes a basis for recovery of damages." Where a personal injury to a little girl is such as to seriously impair her prospects of marriage when she reaches a marriageable age, such fact may properly be considered by a jury as an element of damages resulting from the injury.

but annoyance caused by contemplation of such disfigurement is too remote to be considered as an element of damages.<sup>72</sup>

§ 731. **Actual, exemplary, punitive or vindictive damages.**—Here, as in the case of common carriers of goods, exemplary, punitive or vindictive damages can no doubt be recovered, and for the same reasons and under the same circumstances; as where there is wanton or malicious invasion of the rights of the injured person, where there is vindictiveness on the part of the defendant, the weight of authority seems to be that exemplary or punitive damages may be recovered.

The discussions already had upon this subject as applicable to common carriers of goods will apply here,<sup>73</sup> and while there is some disagreement among the courts with reference to this subject, it would seem that the real difference in the holdings of the courts is very slight. The courts that seem to take exceptions to this rule are those which hold that damages must be compensatory, and yet it does not require a very great stretch of the imagination, or any other than the application of sound reasoning, for one to conclude that exemplary or vindictive damages as held by the majority of the courts are, after all, generally simply compensatory; in that it is compensation for the real and actual damage to the person who has suffered the injury — compensation for the wanton and malicious invasion of rights. Because in such cases the oppression and vindictiveness of the defendant who has been guilty of perpetrating the wrong cannot be fully compensated for in any other way, and so such damages are after all actual and compensatory.

<sup>72</sup> *Giffen v. City* (Idaho, 1898), 55 Pac. 545; *Kalen v. Railway Co.*, 18 Ind. App. 202, 47 N. E. 694. Where there is physical injury from which damage results,

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<sup>73</sup> See *ante*, § 706, etc.

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